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

DIVISION ONE
FILED: 07/19/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0522
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ANIL N. CHARRAN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-111295-003

The Honorable Kristin C. Hoffman, Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
And Angela Kebric, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 Anil N. Charran appeals his convictions and sentences for two counts of burglary. For the reasons that follow, we

affirm the convictions and sentences but correct the amount of presentence incarceration credit awarded.

I. Presentence Incarceration Credit

¶2 Charran argues he is entitled to 504 days of presentence incarceration credit, not the 386 days awarded. Although Charran did not raise this issue below, awarding an incorrect amount of presentence incarceration credit is fundamental error. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). We have the authority to correct errors in computing presentence incarceration credit. Ariz. Rev. Stat. ("A.R.S.") § 13-4037; *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). Charran was arrested and booked into jail on the burglary charges on March 1, 2010. On March 17, 2010, he posted a secured appearance bond. The record reflects, though, that Charran was still in custody the following day, where he remained until sentencing on July 18, 2011. Charran was therefore entitled to 504 days of presentence incarceration credit. *See State v. Carnegie*, 174 Ariz. 452, 453-54, 850 P.2d 690, 691-92 (App. 1993) (defendant is entitled to full day of credit for the day he is booked into custody); *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987) (first day of sentence does not count as presentence incarceration credit). We order the presentence incarceration

credit corrected to reflect 504 days' credit on the burglary sentences.

II. Sufficiency of the Evidence

¶3 Charran argues the evidence was insufficient to support his conviction for the burglary charged in count one. We review *de novo* the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted). We view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). We do not distinguish between direct and circumstantial evidence. *State v. Stuard,* 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993) (citation omitted). Intent may be proven by circumstantial evidence; it "rarely can be proven by any other means." *State v. Thompson,* 204 Ariz. 471, 479, ¶ 31, 65 P.3d 420, 428 (2003) (citation omitted). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted).

¶4 The offense of burglary in the second degree requires proof beyond a reasonable doubt that the defendant "enter[ed] or remained[ed] unlawfully in or on a residential structure with

the intent to commit any theft or any felony therein." A.R.S. § 13-1507(A). The evidence, viewed in the light most favorable to affirming the conviction, was sufficient to establish that Charran participated in the first burglary, which occurred on February 28, 2010, sometime between 5:30 and 7:30 p.m.

¶5 Relatives of the deceased homeowner locked and secured the home at noon and again at 5:30 p.m. the day of the burglaries. When they returned at 7:30 p.m., doors were cracked open. A wet-tile saw, power washer, and several welders were missing. There were new tire tracks on the wet grass in the front yard. While the relatives were deciding what to do, they saw Charran drive his truck slowly past the house with his lights off, disappear out of sight, and then return, driving in the opposite direction, still without headlights. Charran backed his truck into the driveway and parked in the front yard, in the same spot where a vehicle had parked earlier. Charran "nonchalant[ly]" entered the house through the front door, and, in two trips, took a vacuum cleaner, a steam cleaner, and a clock to his truck. When one of the relatives confronted Charran, he fled and was later found hiding in some bushes, where he was flushed out by a police dog.

¶6 Charran admitted to a police officer that he had stolen property on the front porch of his residence, specifically a power washer and wet saw. Officers subsequently

found items stolen during the first burglary at Charran's residence on the front porch and in a locked shed.

¶7 The jury could have reasonably inferred from Charran's possession of property stolen during the first burglary, little more than two hours after it was stolen, that he had stolen it. *See State v. Bouillon*, 112 Ariz. 238, 242, 540 P.2d 1219, 1223 (1975) (citation omitted) ("Possession of recently stolen property warrants an inference that the possessor was the taker."). Moreover, the jury could reasonably have inferred from Charran's conduct during the second burglary, including driving by the house with his lights off before parking in the same location a vehicle had earlier been, and nonchalantly entering the house through the cracked-open front door to remove items, that he was familiar with the home from his presence there at the earlier burglary.

III. Instruction on Concealment

¶8 At the State's request, and without objection from the defense, the court instructed the jury:

> Flight or Concealment. In determining whether the State has proved the Defendant guilty beyond a reasonable doubt, you may consider any evidence of the Defendant's running away, hiding or concealing evidence, together with all the other evidence in the case. You may also consider the defendant's reasons for running away, hiding or concealing evidence.
>
> Running away, hiding or concealing evidence after a crime has been committed does not by itself prove guilt.

Charran objects only to the portion of the instruction addressing "concealing evidence," arguing the "stolen items were in plain sight on the porch and in a storage shed . . . not concealed in any way that suggests wrongdoing, hiding or knowledge that they were stolen." According to Charran, the evidence connecting him to the first burglary was thin, so the instruction "undoubtedly impacted jurors in their verdict on Count I."

¶9 A flight instruction, and by extension, a concealment instruction, is proper "only when the defendant's conduct manifests a consciousness of guilt." *State v. Speers*, 209 Ariz. 125, 132, ¶ 27, 98 P.3d 560, 567 (App. 2004) (citation omitted). Whether such an instruction should be given "is determined by the facts in a particular case." *Id.* (citation omitted). We review the giving of such an instruction for an abuse of discretion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003). Because Charran did not object to the instruction, though, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Charran bears the burden of establishing error, that the error was fundamental, and that the error caused him prejudice. *Id.*

¶10 Charran has not met his burden of establishing fundamental, prejudicial error. He did not leave all of the stolen property in plain sight. Rather, he put some of it in a locked storage shed. He denied having any stolen property "inside" his residence and then admitted only that "there may be a power washer and a wet saw that was stolen on his front porch." Charran did not mention that he had hidden more stolen property behind his locked shed door. On this record, Charran's conduct following commission of the offenses evidenced a consciousness of guilt sufficient to support the challenged portion of the jury instruction. We find no error, let alone fundamental, prejudicial error stemming from the instruction.

IV. Denial of Mistrial

¶11 Finally, Charran argues the court erred by denying his request for a mistrial on the ground that a police officer introduced hearsay by volunteering at trial that his sergeant had told him that Charran's accomplices "may have indicated that there was stolen property at Anil's house." The court denied the mistrial request, but sustained defense counsel's objection to the testimony and later offered to strike the testimony, an offer counsel declined, explaining, "I would rather keep that part of the record, Judge." The court also gave the jury an instruction requested by the defense that "[y]ou are not to consider statements made by any absent participant."

¶12 A mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann,* 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). We review the denial of a mistrial for an abuse of discretion. *State v. Jones,* 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000) (citation omitted). "The trial judge's discretion is broad, because [the judge] is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id*. (citations omitted).

¶13 We find no abuse of discretion. The trial court was in the best position to determine whether striking the testimony and/or giving a curative instruction was sufficient to cure any potential error in the jury's use of the statements for the truth of the matter asserted, rather than for the non-hearsay purpose of eliciting the officer's reason for renewing his questioning of Charran about whether he had any stolen property at his residence. Moreover, Charran's admission to stealing property at the residence made his accomplices' out-of-court statements to the same effect cumulative, minimizing any prejudice should the jury ignore the curative instruction and consider the statements as substantive evidence of Charran's guilt. Finally, defense counsel declined the court's offer to strike the testimony and himself proposed the curative

instruction that was given. *See State v. Logan,* 200 Ariz. 564, 566-67, ¶ 15, 30 P.3d 631, 633-34 (2001) (if defendant requests the instruction, it will not be a ground of error on appeal).

CONCLUSION

¶14 For the reasons stated, we affirm Charran's convictions and sentences, but order his presentence incarceration credit increased to 504 days.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
PHILIP HALL, Judge

/s/
RANDALL M. HOWE, Judge