DIVISION ONE
FILED: 07/31/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0599
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ELADIO LOPEZ RUBIO,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-141318-001

The Honorable Connie Contes, Judge

AFFIRMED

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

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

K E S S L E R, Judge

¶1 Defendant Eladio Lopez Rubio ("Rubio") appeals his convictions and sentences on three counts of aggravated assault

and one count of disorderly conduct for threatening his girlfriend and her parents at gunpoint when he arrived to pick up his infant son for visitation. For the reasons that follow, we affirm.

DISCUSSION

¶2 Rubio first argues the trial court abused its discretion in giving the standard flight or concealment of evidence instruction, because he contends the instruction was not supported by the evidence.[1] We review a trial judge's decision to give a flight instruction for abuse of discretion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003). We find no such abuse of discretion in this case.

¶3 A flight or concealment instruction is proper "only when the defendant's conduct manifests a consciousness of guilt." *State v. Speers*, 209 Ariz. 125, 132, 133, ¶¶ 27, 31, 98 P.3d 560, 567, 568 (App. 2004) (holding presence of passport and printout of flight itinerary in defendant's backpack did not

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[1] Over Rubio's objection, the judge instructed the jury as follows:

> 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.

support flight instruction). *Compare State v. Cota*, 229 Ariz. 136, 142, ¶ 11, 272 P.3d 1027, 1033 (2012) (holding remoteness of flight eight days after the commission of the crime went to weight and not admissibility of flight evidence; such evidence is admissible to show consciousness of guilt if the defendant flees in a manner which invites suspicion or announces guilt). In *Speers*, as is true in this case, the instruction allowed the jury to consider evidence of "running away, hiding, or concealing evidence" in determining guilt, but instructed that such evidence does not by itself prove guilt. *Speers*, 209 Ariz. at 132, ¶ 26, 98 P.3d at 567. "The decision whether such an instruction should be given is determined by the facts in a particular case." *Id.* at 132, ¶ 27, 98 P.3d at 567 (citation and internal quotation marks omitted). A two-fold test must be applied to determine whether a flight instruction is warranted: 1) the evidence must support a reasonable inference that the flight was open, such as the result of an immediate pursuit, **or** 2) the evidence must support the inference that the accused attempted concealment. *State v. Wilson*, 185 Ariz. 254, 257, 914 P.2d 1346, 1349 (App. 1996) (citation omitted). Evidence that a defendant left the scene of the crime by itself does not warrant an instruction on flight. *Id.*

¶4 Rubio testified that he left his girlfriend's house after he broke a door panel and heard someone say "call the

police," because he thought it would look very bad for him to have a gun. The officer who arrested Rubio testified that when he arrived at Rubio's apartment complex, Rubio got out of a Cadillac in the parking lot and reached inside the trunk. Rubio ignored the officer's command to approach and ran up the stairs and into his apartment for a brief moment before reemerging. Police found the gun in the Cadillac's trunk and Rubio admitted during trial to having placed the gun in his trunk.

¶5 Rubio's testimony that he left the scene to avoid getting caught with the gun and his conduct in putting the gun in the Cadillac's trunk, coupled with his admission he did not want to be caught with a gun, provided sufficient evidence for the instruction. We find no abuse of discretion in the judge's decision to give the instruction.

¶6 Rubio also argues the trial court erred in sustaining, on hearsay grounds, objections to his testimony about statements purportedly made by his girlfriend's mother, preventing him from presenting a complete defense. "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 476 U.S. 479, 485 (1984)). That right "is not unlimited, but rather is subject to reasonable restrictions," including evidentiary rules. *See United States v. Scheffer*, 523 U.S. 303, 308 (1998). Although

we ordinarily review evidentiary rulings for abuse of discretion, we review evidentiary rulings that implicate the Confrontation Clause *de novo*. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006).

¶7 As an initial matter, defense counsel failed to make an offer of proof of what Rubio's testimony would have been about statements purportedly made by his girlfriend's mother. "Ordinarily, a ruling of a trial court excluding evidence cannot be reviewed on appeal in the absence of an offer of proof . . . ." *State v. Bay*, 150 Ariz. 112, 115, 722 P.2d 280, 283 (1986). When, however, the substance of the evidence is apparent from the context within which questions were asked, we can consider a claim of error absent an offer of proof. *See* Ariz. R. Evid. 103(a)(2).

¶8 In context, it is apparent that Rubio would have testified that his girlfriend's mother said Rubio would not be allowed to take his infant son. The jury heard Rubio's recorded pre-trial police interview in which Rubio said his girlfriend's parents told him he could not see his child. It is clear from the context that Rubio would have testified his girlfriend's mother told him that he could not take his infant son.

¶9 At trial, the girlfriend's mother testified and denied telling Rubio that he could not see his infant son. This denial meant the precluded testimony was admissible to impeach the

credibility of the girlfriend's mother. In addition, the precluded testimony would have been admissible to show why Rubio was upset, a purpose that would not implicate the truth of the matter asserted.

¶10 On this record, however, we find that any error in precluding the statement was harmless. *State v. Fulminante*, 161 Ariz. 237, 250, 778 P.2d 602, 615 (1988) (holding any error in allowing the jury to hear prosecutor's argument on objection to his question was harmless because the defendant suffered no prejudice). It was no justification to the charged crimes that statements by the girlfriend's mother upset Rubio. We are convinced that the admission of this testimony would have had no effect on the jury's evaluation of the credibility of the girlfriend's mother.

¶11 First, in the pre-trial interview played for the jury, Rubio admitted to being upset when the girlfriend's parents said Rubio could not see his infant son. In closing, Rubio argued this statement caused him to become so upset that he broke the front door. Under these circumstances, Rubio's precluded testimony would have been cumulative. Second, at trial, Rubio flatly denied pulling his gun out of the holster and pointing it at anyone. The girlfriend's parents, however, both testified that Rubio pointed the gun at them. The girlfriend told police at the time of the incident that Rubio had pointed the gun at

her through a hole he made in the front door. On this record, we are convinced that any error in limiting Rubio's testimony on the precise statement the girlfriend's mother made to cause him to be upset had no impact on the verdict, and accordingly was harmless.

CONCLUSION

¶12 For the foregoing reasons, we affirm Rubio's convictions and sentences.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
SAMUEL A. THUMMA, Judge