

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: 8/13/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 12-0399  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) MEMORANDUM DECISION  
) (Not for Publication - Rule  
JESSIE DAGNINO, ) 111, Rules of the Arizona  
) Supreme Court)  
Appellant. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-103546-001

The Honorable Sherry K. Stephens, Judge

**AFFIRMED**

Thomas C. Horne, Arizona Attorney General Phoenix  
By Joseph T. Maziarz, Chief Counsel, Criminal Appeals  
and Jana Zinman, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Jeffrey L. Force, Deputy Public Defender  
Attorneys for Appellant

**N O R R I S**, Judge

¶1 Jessie Dagnino appeals his conviction and sentence for unlawful flight from a law enforcement vehicle.<sup>1</sup> On appeal he

<sup>1</sup>Dagnino was also convicted of possession or use of narcotic drugs and possession or use of marijuana. On appeal,

argues the superior court abused its discretion in refusing to give a lesser-included offense instruction on failure to yield. We disagree, and therefore, affirm his conviction and sentence for unlawful flight.

#### **FACTS AND PROCEDURAL BACKGROUND<sup>2</sup>**

¶12 On January 20, 2011, at 9:20 P.M., a police officer on patrol attempted to stop Dagnino for traffic violations after observing he had "rolled through the red light" while making a right turn, and entered the middle lane -- rather than the immediate curb lane -- of a three-lane road. While following Dagnino in a fully marked police car, the officer activated first his car's overhead emergency lights and then its siren, but Dagnino did not slow down or stop. After approximately a quarter mile, the officer temporarily ended the pursuit to determine the car's registered address.

¶13 The officer eventually located Dagnino and his car, and subsequently found drugs in the car. After the officer read Dagnino his *Miranda* rights, Dagnino admitted he had seen the emergency lights and heard the siren, but had not stopped

---

he does not challenge his convictions and sentences on these two counts.

<sup>2</sup>We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Dagnino. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

because he did not want to "get into trouble" for the drugs in his car.

¶4 A grand jury indicted Dagnino for unlawful flight from a law enforcement vehicle, a class five felony. At trial, the superior court denied Dagnino's request for a lesser-included offense instruction on the offense of failure to yield. After the jury found Dagnino guilty of unlawful flight, the court sentenced him to a prison term on this count.

#### DISCUSSION

¶5 An offense is a lesser-included offense when "the charging document describes the lesser offense even though it does not always make up a constituent part of the greater offense." *State v. Brown*, 195 Ariz. 206, 207, ¶ 5, 986 P.2d 239, 240 (App. 1999) (quoting *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 12, 965 P.2d 94, 97 (App. 1998)). Dagnino argues that under the charging documents test,<sup>3</sup> the superior court should have instructed the jury on failure to yield as a lesser-included offense of unlawful flight. We disagree; the

---

<sup>3</sup>An offense may also be deemed a lesser-included offense if it meets the "elements" test -- "whether the purported lesser included offense is, by its nature, always a constituent part of the greater offense." *In re Jerry C.*, 214 Ariz. 270, 273, ¶ 8, 151 P.3d 553, 556 (App. 2007) (emphasis in original). Dagnino conceded at trial and concedes on appeal that failure to yield is not an inherent constituent part of unlawful flight, and thus, not a lesser-included offense under the elements test.

superior court did not abuse its discretion in denying Dagnino's request for a lesser-included offense instruction.<sup>4</sup> *State v. Anderson*, 210 Ariz. 327, 343, ¶ 60, 111 P.3d 369, 385 (2005) (appellate court reviews superior court's refusal to give jury instruction for abuse of discretion).

¶16 The unlawful flight statute, Arizona Revised Statute ("A.R.S.") section 28-622.01 (2012), states:

A driver of a motor vehicle who willfully flees or attempts to elude a pursuing official law enforcement vehicle that is being operated in the manner described in § 28-624, subsection C is guilty of a class 5 felony. The law enforcement vehicle shall be appropriately marked to show that it is an official law enforcement vehicle.

The manner of operation prescribed in A.R.S. § 28-624(C) (2012) requires the law enforcement vehicle to give "an audible signal by bell, siren or exhaust whistle as reasonably necessary . . . ."<sup>5</sup>

---

<sup>4</sup>In *State v. Ortega*, another panel of this court questioned the use of the charging documents test as a separate test for the purpose of double jeopardy. 220 Ariz. 320, 324-25, ¶ 13, 206 P.3d 769, 773-74 (App. 2008). The parties have not cited *Ortega* in their briefing and have not disputed the validity of the charging documents test as an alternate test for determining whether an offense is a lesser-included offense.

<sup>5</sup>Police vehicles are exempt from the emergency light requirement and "need not be equipped with or display [emergency lights] visible from in front of the vehicle." A.R.S. § 28-624(C); *State v. Fiihr*, 221 Ariz. 135, 138, ¶ 11, 211 P.3d 13, 16 (App. 2008).

¶17 On the other hand, the failure to yield statute, A.R.S. § 28-775(A) (2012),<sup>6</sup> provides:

Except when otherwise directed by a police officer, on the immediate approach of an authorized emergency vehicle that is equipped with at least one lighted lamp exhibiting a red or red and blue light or lens visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle and that is giving an audible signal by siren, exhaust whistle or bell, the driver of another vehicle shall:

1. Yield the right-of-way.
2. Immediately drive to a position parallel to and as close as possible to the right-hand edge or curb of the roadway clear of any intersection.
3. Stop and remain in the position prescribed in paragraph 2 of this subsection until the authorized emergency vehicle has passed.

¶18 Here, the indictment, tracking the language of A.R.S. § 28-622.01, read as follows:

JESSIE DAGNINO, on or about the 20th day of January, 2011, while driving a vehicle willfully fled or attempted to elude a pursuing official law enforcement vehicle which was being operated with proper emergency equipment, in violation of A.R.S. §§ 28-622.01, 28-624(C), 28-3001, 28-3304, 28-3305, 28-3315, 13-701, 13-702, and 13-801.

---

<sup>6</sup>Although the Arizona Legislature amended this statute after the date of Dagnino's offense, the revision was immaterial. We thus cite to the current version of this statute.

¶9 This language did not describe the offense of failure to yield. The failure to yield statute is premised on a driver's failure to heed the approach of an emergency vehicle using lights and sirens, and accordingly, requires a driver to respond in specific manners allowing room for the emergency vehicle to pass safely. A.R.S. § 28-775(A). The language quoted above did not refer to Dagnino's failures to yield the right-of-way, "[i]mmediately drive to a position parallel to and as close as possible to the right-hand edge or curb of the roadway[,] stop, and remain in that position until the "emergency vehicle" had passed. See *id.* In contrast to the conduct described in A.R.S. § 28-775(A), the indictment did not allude to any of the required precautionary actions a driver should undertake "until the authorized emergency vehicle has passed[,] and thus, did not describe the offense of failure to yield.

¶10 Nevertheless, Dagnino argues the absence of any language in the indictment that could implicate the offense of failure to yield was "inconsequential" because the trial evidence reflected he had failed to "stop on command," and thus had failed to "yield on command." In making this argument, Dagnino relies on *State v. Magana*, 178 Ariz. 416, 874 P.2d 973 (App. 1994). Dagnino's reliance on *Magana* is misplaced.

¶11 In *Magana*, the court held reckless driving could be a lesser-included offense of second-degree murder because the defendant's use of an automobile in connection with a fatal automobile accident was implicit in the indictment's language, which used "Highway 95" and "Milepost 240.9" to describe the location of the offense. *Id.* at 418, 874 P.2d at 975. Here, a failure to yield to allow a law enforcement officer to pass was not implicit in the language of the indictment. *Magana* does not, therefore, support Dagnino's argument.

¶12 Moreover, this court has refused to read *Magana* as mandating "consideration of all facts ultimately contained in the record in determining whether a lesser-included-offense instruction was required." *State v. Robles*, 213 Ariz. 268, 271, ¶ 9, 141 P.3d 748, 751 (App. 2006). Instead, in applying the charging documents test, this court only examines facts and references -- direct or implied -- contained in the indictment. *Id.*; *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 35, 66 P.3d 59, 69 (App. 2003); *State v. Brown*, 195 Ariz. 206, 208, ¶ 8, 209, ¶ 10, 986 P.2d 239, 241-42 (App. 1999) (rejecting defendant's argument lesser-included offense instruction should be given based on evidence presented at trial because "the charging document and not the evidence [] determines the issue").

¶13 Here, as discussed, the indictment did not describe the essential features of the failure to yield offense.

Accordingly, we will not supplement the indictment with, and draw inferences from, facts later presented at trial. Ariz. R. Crim. P. 13.2(a) (indictment must state "facts sufficiently definite to inform the defendant of the offense charged"); *State v. Maxwell*, 103 Ariz. 478, 480, 445 P.2d 837, 839 (1968) (charging document "must fairly indicate the crime charged, must state the essential elements of the alleged crime, and must be sufficiently definite to apprise the defendant so that he can prepare his defense to the charge").

¶14 Finally, Dagnino argues the language in the indictment -- "proper emergency equipment" -- referred to the lights and sirens of the police vehicle as required under A.R.S. § 28-775(A), and thus "subsumed" the failure to yield statute. We disagree. The reference to "proper emergency equipment" in the indictment was too general to implicate the offense of failure to yield under the charging documents test.



