DIVISION ONE
FILED: 10/22/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0483
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule
LARRY GENE KELSO,	)	111, Rules of the Arizona
	)	Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2011-008241-001

The Honorable Randall H. Warner, Judge

AFFIRMED

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

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

N O R R I S, Judge

¶1 Larry Gene Kelso appeals his conviction and sentence for aggravated assault arguing the superior court should not have instructed the jury on flight or concealment of evidence

because the trial evidence did not support giving the instruction. We disagree.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On January 5, 2007, Kelso, who was then employed by the Mesa Police Department, was involved in a confrontation with his teenage stepson, B.C. The confrontation escalated, and Kelso deployed his department-issued taser striking B.C. in the leg.

¶3 Mesa Police Department required each officer to file a report with it each time a department-issued taser was deployed detailing the circumstances surrounding the deployment.[2] Instead of reporting to the department he had deployed the taser on B.C., Kelso reported he had deployed his taser on a stray dog. Kelso also filed a police report concerning the stray dog with the Gilbert Police Department.

¶4 In August 2011, after Kelso and B.C.'s mother had separated, B.C. informed his mother about the incident with Kelso. She subsequently filed a report with the Gilbert Police

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

[2]Tasers issued by the Mesa Police Department record every use. When the taser undergoes routine maintenance, it is plugged into a computer and the taser generates a supplemental report indicating the date and time of each use, as well as the length of deployment.

Department. At trial, the State played a confrontation call between Kelso and B.C. during which Kelso acknowledged tasing B.C. on January 5, 2007. The jury convicted Kelso of aggravated assault, a class 6 undesignated felony and domestic violence offense.

DISCUSSION

¶5 Over Kelso's objection, the superior court instructed the jury on flight or concealment:

> 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 running away, hiding or concealing evidence together with all the evidence in the case. Running away, hiding or concealing evidence after a crime has been committed does not by itself prove guilt.

Whether this instruction was supported by the evidence is the only issue on appeal.

¶6 As a preliminary matter, we note Kelso did not properly preserve this issue for our review. In general, objections to the giving of a jury instruction must "stat[e] distinctly the matter to which the party objects and the grounds of his or her objection." Ariz. R. Crim. P. 21.3(c). When a party fails to state the specific ground of his objection, the objection is waived. *State v. Whitaker*, 112 Ariz. 537, 543, 544 P.2d 219, 225 (1975). At trial, defense counsel objected

generally to the proposed flight or concealment instruction. Therefore, this issue is waived.

¶7 Nevertheless, even if not waived, the State presented substantial evidence at trial to warrant the instruction, and the superior court did not abuse its discretion in so instructing the jury. *State v. Hurley*, 197 Ariz. 400, 402, ¶ 9, 4 P.3d 455, 457 (App. 2000) (appellate court reviews superior court's decision to give a jury instruction for abuse of discretion); *see also State v. Speers*, 209 Ariz. 125, 132, ¶ 27, 98 P.3d 560, 567 (App. 2004) (superior court commits reversible error when it instructs jury on an issue unsupported by evidence).

¶8 A flight or concealment instruction is appropriate if the jury can reasonably infer from the evidence a consciousness of guilt from the defendant's manner in leaving the scene of a crime or from his destruction or concealment of evidence tending to prove the crime. *State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992); *State v. Smith*, 113 Ariz. 298, 300, 552 P.2d 1192, 1194 (1976) ("[T]he evidence must support the inference that the accused utilized the element of concealment or attempted concealment."). False or misleading statements to police may be some evidence "showing consciousness of guilt." *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27, 975 P.2d 75, 84 (1999). And, concealment is defined as "an act by which one

prevents or hinders the discovery of something; a cover-up." Black's Law Dictionary 306 (8th ed. 2004).

¶9 Here, Kelso covered-up the true circumstances surrounding his deployment of the taser by making false statements to, and filing false reports with, the Mesa and Gilbert police departments. At trial, Kelso admitted filing the false reports to avoid disclosing what had actually happened with B.C. Based on this evidence, the jury could reasonably infer "a consciousness of guilt." *See Salazar*, 173 Ariz. at 409, 844 P.2d at 576. Accordingly, the superior court did not abuse its discretion in instructing the jury on concealment.

¶10 Kelso correctly notes the State did not present any evidence at trial to suggest flight or attempted flight. Flight was simply not an issue in this case, and the jury instruction should have been edited to reflect the facts presented at trial. *U.S. v. Brown*, 575 F.2d 746, 747 (9th Cir. 1978) (explaining "the 'boiler plate' instruction should have been edited to delete the surplusage" if no evidence of flight after arrest). The references to flight in the instruction, however, constituted harmless surplusage because the evidence was overwhelming that Kelso had concealed he had tased B.C.

CONCLUSION

¶11 For the foregoing reasons, we affirm Kelso's conviction and sentence.

/s/
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
JON W. THOMPSON, Judge