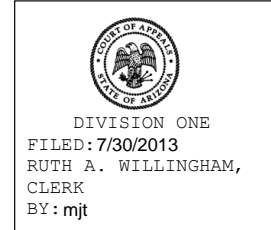


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 12-0518  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
) Rule 111, Rules of the  
JOSEPH ANDREW DAVY, ) Arizona Supreme Court)  
)  
Appellant. )  
)  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2010-165072-001

The Honorable Randall H. Warner, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
by Joseph T. Maziarz, Acting Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and W. Scott Simon, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
by Mikel Steinfeld, Deputy Public Defender  
Attorneys for Appellant

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P O R T L E Y, Judge

¶1 Defendant Joseph Andrew Davy appeals his conviction  
and sentence for attempted armed robbery, a dangerous felony.

He asserts the trial court erred by giving a flight and concealment instruction to the jury. For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶12 The victim left his house to go to church on Sunday morning, December 12, 2010.<sup>1</sup> Davy, wearing a ski mask, gloves and dark clothing, demanded the keys from the victim, and attacked and repeatedly hit the victim with a hammer. The victim, however, was able to wrestle free. Davy ran away after a truck pulled up and the man inside started to intervene. While the other person in the truck was calling 911, the man from the truck watched the assailant flee and later described him as wearing a black hooded sweatshirt, black beanie, and camouflage pants.

¶13 A police officer subsequently located Davy, clad in a t-shirt and shorts, in an alley in the victim's neighborhood. The officer observed that Davy was carrying a partially open backpack containing a camouflage-patterned material and asked Davy if he could search the backpack. Davy consented, and the officer found a black ski mask, black sweatshirt, camouflage pants, a white baseball cap, a hammer holder, a knife, gloves, a

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<sup>1</sup> We view the facts "in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997).

gun, and a stun gun. Subsequently, a forensic scientist found Davy's DNA on the pants' waistband and white baseball cap. The scientist also found the victim's DNA on the pants and on a clip attached to the pants.

¶14 Davy was indicted, tried, convicted, and sentenced for attempted armed robbery. Davy now appeals.

#### DISCUSSION

¶15 Davy contends that the court erred by giving a flight or concealment instruction over his trial objection. He argues that the instruction was an impermissible comment on the evidence, relieved the State of its burden of proof, and was unnecessary. We review the decision to give a jury instruction for an abuse of discretion and "consider the jury instructions as a whole to determine whether the jury received the information necessary to arrive at a legally correct decision." *State v. Dann*, 220 Ariz. 351, 363-64, ¶ 51, 207 P.3d 604, 616-17 (2009).

¶16 A flight or concealment instruction is proper if there is "evidence of open flight, as upon pursuit, or concealment, and the manner of leaving the scene . . . reveal[s] a consciousness of guilt." *State v. Celaya*, 135 Ariz. 248, 256, 660 P.2d 849, 857 (1983). Because "[t]he key inquiry is whether the defendant engaged in some type of eluding behavior designed to camouflage his participation in a crime, thus manifesting a

consciousness of guilt," *State v. Cutright*, 196 Ariz. 567, 570, ¶ 12, 2 P.3d 657, 660 (App. 1999), disapproved of on other grounds by *State v. Miranda*, 200 Ariz. 67, 22 P.3d 506 (2011), a flight or concealment instruction is proper despite a defendant's alternative explanation for his flight or concealment so long as the evidence supports a consciousness of guilt. See *State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199 (1983).

¶17 Here, the two people in the truck who stopped to intervene saw a man, generally matching Davy's description, run from the crime scene while wearing what appeared to be a backpack. The police found Davy in a nearby alley, wearing only a t-shirt and shorts, sweating, and carrying a backpack. The backpack, which Davy told the arresting officer was his, contained clothing matching the description of the attacker's clothing. After forensic testing, some of the clothing items in the backpack contained either Davy's or the victim's DNA.

¶18 At trial, Davy asserted that he did not attack the victim and was not trying to conceal anything but merely found the backpack in the alley while searching for potential landscaping jobs. Notwithstanding his testimony, there was some evidence that Davy had attempted to avoid being discovered for assaulting the victim by running from the scene, removing his outer clothing and stuffing them in his backpack. See, e.g.,

*Hunter*, 136 Ariz. at 48, 664 P.2d at 198 (explaining that "by fleeing the scene of a crime or by concealing oneself to avoid arrest, one manifests a consciousness of guilt," and "[t]his consciousness of guilt, in turn, gives rise to an inference of actual guilt"); *State v. Lujan*, 124 Ariz. 365, 371, 604 P.2d 629, 635 (1979) ("Running from the scene of a crime, rather than walking away, may provide evidence of a guilty conscience prerequisite to a flight instruction."). As a result, the evidence supports the court's determination to give the instruction. See *State v. Parker*, 231 Ariz. 391, ¶ 50, 296 P.3d 54, 67 (2013) (stating that the defendant's "explanation for his flight did not preclude the trial court from giving a flight instruction").

¶9 After the closing arguments, the jury had to evaluate all of the evidence, determine the credibility of the witnesses and determine the facts. *State v. Williams*, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004). The jury was free to infer, from both circumstantial and direct evidence, that Davy's "actions were evidence of concealment which reflected a consciousness of guilt." *State v. Earby*, 136 Ariz. 246, 248, 665 P.2d 590, 592 (App. 1983); see also *State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970) (explaining that "the law makes no distinction between circumstantial and direct evidence").

¶10 The fact that the jury found Davy guilty after considering all of the evidence does not demonstrate that the instruction was an impermissible comment on the evidence, relieved the State of its burden of proof or was unnecessary. The State was required to meet its burden of proof beyond a reasonable doubt that Davy attacked the victim in an attempt to commit a robbery. The State had to prove the identity of the masked assailant and did so by the testimony of witnesses, the police, a forensic scientist, and the clothing. The jury found that the State met its burden of proof. Because the court properly instructed the jury based on the evidence and considering the current state of law in Arizona as articulated by our supreme court, the court did not abuse its discretion by giving the instruction.

**CONCLUSION**

¶11 Based on the foregoing reasons, we affirm.

/s/

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MAURICE PORTLEY, Judge

CONCURRING:

/s/

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RANDALL M. HOWE, Presiding Judge

/s/

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PATRICIA A. OROZCO, Judge