

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LAWRENCE ALLAIN, JR. , *Appellant*.

No. 1 CA-CR 13-0140
FILED 12-3-2013

Appeal from the Superior Court in Maricopa County
No. CR2012-122883-001
The Honorable Patricia A. Starr, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Spencer D. Heffel

Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Andrew W. Gould delivered the decision of the Court, in which Judge Donn Kessler and Judge Michael J. Brown joined.

G O U L D, Judge:

¶1 Lawrence Allain, Jr. appeals from his convictions of possession of dangerous drugs, possession of marijuana, and possession of drug paraphernalia. On appeal, Allain contends that the trial court's flight/concealment instruction to the jury was improper and amounted to prejudicial error. Allain requests reversal. For the following reasons, we affirm.

Facts and Procedural Background

¶2 On May 2, 2012, Phoenix Police Officer D. Baynes arrested Allain for an outstanding arrest warrant. During a search incident to arrest, Officer Baynes found a marijuana pipe containing marijuana residue. As he continued his search, Officer Baynes felt a large bulge on the inside of Allain's right ankle. Allain then "snapped his feet or legs together," and Officer Baynes removed two bags of methamphetamine from Allain's right sock.

¶3 Allain was charged with possession of dangerous drugs, possession of marijuana, and possession of drug paraphernalia. At trial, the court gave a flight/concealment instruction to the jury, which read 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.

¶4 Allain did not object to this instruction at trial. The court also instructed the jury that as they determined the facts they "may find

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that some of [the] instructions no longer apply,” and, if so, they should only “consider the instructions that do apply, together with the facts as [they] have determined them.”

¶5 The jury found Allain guilty on all counts. Allain filed a timely notice of appeal. This court has jurisdiction under Article 6, § 9 of the Arizona Constitution, and Arizona Revised Statutes (“A.R.S.”) §§ 12-120.21(A)(1), 13-4031 and 13-4033(A).

Discussion

¶6 On appeal, Allain argues the court erred in giving the jury a flight/concealment instruction. Allain asserts the evidence did not support this instruction, because he “was in custody before the contraband was discovered” and he “neither fled nor had any further contact with the contraband once it was discovered.” Allain further maintains the evidence showed he was “set up” by Officer Baynes, and as a result the subject instruction “denied him his right to due process of law by allowing the jury to improperly consider flight/concealment where neither existed.”

¶7 As a preliminary matter, we note Allain did not object to the jury instruction at trial, and has therefore waived his right to object to the instruction on appeal. Arizona Rules of Criminal Procedure 21.3(c); *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). As a result, our review is limited to fundamental error.¹ *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 608 (2005). In establishing fundamental error, a defendant must first prove there is error; then he must establish the error goes to “the foundation of the case,” “takes from the defendant a right essential to his defense,” and is error “of such magnitude that the defendant could not possibly have received a fair trial.” *Henderson*, 210 Ariz. at 567-68, ¶¶ 19, 23, 115 P.3d at 607-08 (internal citations omitted).

¹ Because Allain does not argue in his brief that the jury instruction constituted fundamental error, he has also waived this issue. *State v. Estrella*, 230 Ariz. 401, 403-04, ¶ 9, 286 P.3d 150, 152-53 (App. 2012) (fundamental error argument waived on appeal if not argued); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (same). However, we may review for fundamental error even if the issue is not raised on appeal by a defendant. *State v. Henderson*, 210 Ariz. at 571, n.6, 115 P.3d at 611 (Hurwitz, J., Special Concurrence).

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¶8 When a court decides to give a flight or concealment instruction, it is only necessary that one factor, flight or concealment, be present. *State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199 (1983). The decision as to whether the instruction should be given “is determined by the facts in the particular case.” *State v. Cutright*, 196 Ariz. 567, 570, ¶ 12, 2 P.3d 657, 660 (App. 1999), *disapproved on other grounds by State v. Miranda*, 200 Ariz. 67, 69, 22 P.3d 506, 508 (2001). The court must determine whether there is sufficient evidence “from which it can be reasonably inferred that the defendant engaged in some ‘eluding’ conduct that either was an attempt to prevent apprehension, or was an attempt to postpone apprehension in order to dispose of or conceal evidence.” *Id.*

¶9 We conclude there was sufficient evidence to support the trial court’s decision to give the flight/concealment instruction. The State presented evidence that during the search incident to arrest, Allain snapped his legs together when Officer Bayne felt a bulge in his right sock. It can be reasonably inferred from this evidence that Allain was trying to conceal the methamphetamine hidden in his sock. Moreover, it was not error for the court to give the instruction simply because Allain provided conflicting evidence or an alternative theory of what occurred during the incident. *State v. Grijalva*, 137 Ariz. 10, 15, 667 P.2d 1336, 1341 (App. 1983) (The fact that a defendant may offer an explanation from which jurors could draw an inference inconsistent with a consciousness of guilt does not preclude the giving of a flight or concealment instruction because jurors are free to disbelieve the defendant’s explanation), *superseded by statute on other grounds as stated in State v. Cons*, 208 Ariz. 409, 413, ¶ 9, 94 P.3d 609, 613 (App. 2004).

¶10 In addition, the flight/concealment instruction did not constitute an improper comment on the evidence. The instruction was both conditional and permissive; it allowed the jury to decide disputed facts as to the issue of concealment, and also permitted the jury to disregard the instruction if it determined it was irrelevant under the facts of the case. *See State v. Celaya*, 135 Ariz. 248, 257, 660 P.2d 849, 858 (1983) (Holding that the jury flight/concealment instruction was not an improper comment on the evidence because it was “sufficiently conditional,” and “the jury was instructed to disregard any instructions which they found not to apply after they had determined the facts.”).

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Conclusion

¶11 We conclude the trial court did not err in giving a flight/concealment instruction. Accordingly, we affirm Allain's convictions and sentences.



Ruth A. Willingham · Clerk of the Court
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