

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

NICOLE MARIE LINCE, *Appellant*.

No. 1 CA-CR 16-0638
FILED 6-22-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-128350-001
The Honorable Mark H. Brain, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jason Lewis
Counsel for Appellee

Ramos Law Firm, Scottsdale
By Paul A. Ramos
Counsel for Appellant

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MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Donn Kessler joined.

JONES, Judge:

¶1 Nicole Lince appeals her conviction and sentence for one count of unlawful flight from a pursuing law enforcement vehicle.¹ For the following reasons, we affirm.

FACTS² AND PROCEDURAL HISTORY

¶2 At approximately 2:26 a.m. on March 6, 2015, a detective with the Arizona Department of Public Safety (DPS) was parked off State Route 202 and Scottsdale Road in a fully marked DPS vehicle equipped with red and blue emergency lights. The detective observed a vehicle merge onto State Route 202 and begin following another vehicle too closely and decided to pursue the vehicle for further observation. As the vehicle merged onto State Route 143, the detective observed it weave across the solid white fog line two times and nearly hit a barrier wall. Suspecting the driver was under the influence of alcohol, the detective attempted to execute a traffic stop by turning on his red and blue emergency lights and siren. The vehicle did not stop, instead continuing onto Interstate 10. The detective then

¹ Although Lince's notice of appeal indicates she is appealing all convictions and sentences, her opening brief addresses only the conviction for unlawful flight. This failure to address the convictions for driving under the influence (DUI) constitutes waiver of any related claim of error. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) (citations omitted); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi) (stating opening brief must include "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on").

² "We view the facts in the light most favorable to sustaining the convictions with all reasonable inferences resolved against the defendant." *State v. Harm*, 236 Ariz. 402, 404 n.2, ¶ 2 (App. 2015) (quoting *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

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commanded the vehicle to stop through his loudspeaker, with his lights and sirens still activated, but the vehicle continued.

¶3 Although the vehicle traveled at or below the posted speed limit, the detective initiated a formal pursuit and alerted dispatch to call available units to place spike strips to force a stop. Once the vehicle merged onto U.S. Highway 60, a civilian vehicle pulled in front of the vehicle in question and drastically reduced its speed. Although the pursued vehicle nearly collided with the civilian vehicle's rear bumper, it finally reduced its speed and pulled over, ending the pursuit approximately five minutes after the detective first activated his lights and siren.

¶4 The driver of the pursued vehicle, later identified as Lince, was arrested, and subsequent testing indicated her blood alcohol concentration (BAC) was 0.187 and 0.177 percent. Lince was ultimately charged with four counts related to DUI and one count of unlawful flight from a law enforcement vehicle.

¶5 At a bench trial held in May 2016, Lince testified she was not attempting to flee from law enforcement. Rather, she was scared and disoriented and did not believe pulling over on the freeway in the middle of the night was safe. She further testified that, despite her efforts to find a safe place to pull over, each exit she chose moved her onto a different stretch of freeway. The detective, however, testified Lince passed multiple locations that included an emergency lane and gravel right-of-way that allowed adequate room to safely pull over. Indeed, the video taken from the dash of the DPS vehicle showed Lince passing at least one other vehicle that had pulled safely onto the side of the highway.

¶6 The trial court found Lince guilty of all counts. The court specifically found that although Lince was not attempting to elude the detective, "there were a number of places that it was safe for [Lince] to pull over" including areas sufficiently wide and well-lit by streetlights and where other vehicles had safely pulled off the road. For this reason, the court rejected Lince's good-faith defense and determined she was guilty of willful flight from the pursuing law enforcement vehicle in violation of Arizona Revised Statutes (A.R.S.) § 28-622.01.³ Lince was also convicted of the DUI offenses. Lince filed a timely notice of appeal, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

³ Absent material changes from the relevant date, we cite a statute's current version.

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DISCUSSION

¶7 Lince argues there is insufficient evidence to support her conviction for unlawful flight. Questions regarding the sufficiency of evidence are questions of law, subject to *de novo* review. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011) (citing *State v. Bible*, 175 Ariz. 549, 595 (1993)). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at ¶ 16 (emphasis omitted) (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). “Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction.” *Id.* (citing *State v. Spears*, 184 Ariz. 277, 290-91 (1996)).

¶8 Pursuant to A.R.S. § 28-622.01:

A driver of a motor vehicle who wil[l]fully flees or attempts to elude a pursuing official law enforcement vehicle that is being operated [with an audible siren and at least one red or red and blue lighted lamp] 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.

See also A.R.S. § 28-624(C). Lince does not dispute that the law enforcement vehicle was properly marked or operating in the manner described within A.R.S. § 28-624(C). And because the trial court found Lince did not attempt to elude law enforcement, the only remaining issue is whether the evidence presented was sufficient to establish that Lince willfully fled from the detective after he activated his lights and siren. Lince argues her conduct does not qualify as unlawful flight because, she contends, the evidence establishes she intended to pull over as soon as she found a safe place to do so.

¶9 Resolution of this issue requires consideration of the meaning of “wil[l]fully flee” as used within A.R.S. § 28-622.01. Under Arizona law, “[w]il[l]fully’ means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person’s conduct is of that nature or that the circumstance exists.” A.R.S § 1-215(41). Willfulness can be proven by evidence of voluntary or intentional behavior. *See State v. Gendron*, 166 Ariz. 562, 564-65 (App. 1990) *vacated in part on other grounds*, 168 Ariz. 153 (1991).

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¶10 The legislature has not specifically defined “flee” or its variants. We therefore construe the term according to its “fair meaning” and in such a way that “promote[s] justice and effect[s] the objects of the law.” A.R.S. § 13-104; *see also State v. Tramble*, 144 Ariz. 48, 51 (1985). This exact inquiry was performed in *State v. Fogarty*, 178 Ariz. 170 (App. 1993).

¶11 There, this Court considered multiple dictionary definitions of the term “flee” and the dual purposes of A.R.S. § 28-622.01: (1) “to [e]nsure that motorists stop on command,” and (2) “to proscribe conduct which might lead to vehicular accidents.” *Fogarty*, 178 Ariz. at 172 (citations omitted). The *Fogarty* Court ultimately determined that, although the term “flee” often connotes speed, “any refusal to stop on command of an officer who is in a police car violates the felony flight statute because of the potential for personal danger inherent in vehicular pursuit, even if that pursuit does not attain excessive speeds or involve reckless driving.” *Id.* at 171-72 (emphasis omitted). As the U.S. Supreme Court has recognized, even fleeing “without going at full speed” may create “the possibility that police will, in a legitimate and lawful manner . . . use force to bring [the pursued] within their custody. A perpetrator’s indifference to these collateral consequences has violent – even lethal – potential for others.” *Sykes v. United States*, 564 U.S. 1, 9 (2011), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015).⁴

¶12 The evidence indicates Lince was aware a law enforcement officer was attempting to pull her over; Lince admitted she had seen the emergency lights flashing behind her and confirmed she was the vehicle the detective was attempting to stop by executing two lane changes shortly thereafter. Despite this knowledge, Lince did not stop for nearly five minutes, and then only when forced by a civilian vehicle to reduce her speed. Although she traveled at or near the posted speed limit, Lince’s defiance of the detective’s commands continued even after she approached,

⁴ Lince contends this definition is overbroad, and “a line must be drawn between a good-faith attempt to find a safe place to pull over, and a willing and knowledgeable disregard of an officer’s authority.” However, we need not reach this issue because the trial court specifically rejected the factual basis of Lince’s argument that she acted in good faith, and “we defer to the trial court’s factual findings that are supported by the record and not clearly erroneous.” *State v. Rodriguez*, 205 Ariz. 392, 397, ¶ 18 (App. 2003) (quoting *State v. Rosengren*, 199 Ariz. 112, 116, ¶ 9 (App. 2000)). As stated *infra* ¶¶ 12-13, the finding that Lince did not act in good faith is supported by the record.

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and passed, numerous areas where she could have safely stopped. While the statute does not require a reason or purpose be ascribed to the flight, the trial court opined that Lince's failure to stop was caused by fear, and that this fear was at least partially due to her knowledge that she should not have been driving while intoxicated.

¶13 These inferences are reasonably drawn from the evidence that Lince was driving erratically at a time when her BAC was well over the legal limit. Taking Lince's behavior as a whole, we find no error in the trial court's conclusion that her actions were willful. Nor can we say the court erred in determining Lince's conduct falls squarely within the type of behavior A.R.S. § 28-622.01 is intended to protect against. Accordingly, we conclude sufficient evidence supports Lince's conviction for unlawful flight.

CONCLUSION

¶14 Lince's convictions and sentences are affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA