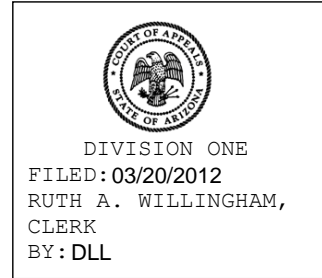


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0311
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
VICTOR RICHARD CHAVEZ,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-109195-001DT

The Honorable Sam J. Myers, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Karen M. V. Noble, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Victor Richard Chavez timely appeals his conviction for unlawful flight from a pursuing law enforcement vehicle ("unlawful flight"). He argues the superior court "improperly

instructed the jury on the mental state required to commit unlawful flight" by "equat[ing] willfully to knowingly," rather than instructing the jury it must find he committed the offense "intentionally." As explained below, we disagree.

¶12 Although we ordinarily review "de novo a claim that a jury instruction misstates the law," because Chavez' counsel did not object to the court's instruction or argue the superior court should have given a different instruction, we review for fundamental, prejudicial error. *State v. Moody*, 208 Ariz. 424, 466, ¶ 189, 94 P.3d 1119, 1161 (2004) (citations omitted); see also *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶13 As pertinent here, the charge of unlawful flight requires the State to prove beyond a reasonable doubt that a driver of a motor vehicle "wilfully" fled or attempted to elude "a pursuing official law enforcement vehicle." Ariz. Rev. Stat. ("A.R.S.") § 28-622.01 (2004). In instructing the jury on the elements of this charge, the superior court used the Revised Arizona Jury Instructions, Title 28 Vehicular Crimes Instruction 28.622.01 (Unlawful Flight From Pursuing Law Enforcement Vehicle), which states, "[a]n act was done willfully if it was done knowingly." The court later used the criminal code's ("Title 13") definition of knowingly to explain to the jury

"[k]nowingly" 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. It does not require any knowledge of the unlawfulness of the act or omission.

A.R.S. § 13-105(10)(b) (2009).

¶4 As the State points out, the general statutory definition of "wilfully" -- "with respect to conduct or to a circumstance described by a statute defining an offense . . . 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(42) (2006) -- mirrors the definition of "knowingly" quoted above.

¶5 Despite this, Chavez argues the superior court should have instructed the jury that "wilfully," in this context, meant the same thing as the statutory definition of "intentionally" in A.R.S. § 13-105(10)(a) -- "with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct" -- a more specific mental state than "knowingly."¹ See A.R.S. § 13-202(C) (2010) (establishing hierarchy of culpable mental states). We disagree.

¹To the extent Chavez argues the court should have used the "common meaning" of willfully rather than a statutory definition, he still essentially proposes the court should have used a definition equivalent to "intentional." In his opening brief, for example, he argues the "ordinary definition of willful is an act that is done intentionally."

¶16 First, as discussed, on its face, the applicable statutory definition of "wilfully"² is consistent with the definition of "knowingly," and does not match the definition of "intentionally." Second, although perhaps in dicta, this court has previously explained in an unlawful flight case, "[t]he [general statutory] definition of 'wilfully' . . . is equivalent to the definition of 'knowingly'" given in Title 13. *State v. Gendron*, 166 Ariz. 562, 565, 804 P.2d 95, 98 (App. 1990) *vacated in part on other grounds*, 168 Ariz. 153, 812 P.2d 626 (1991); *see generally Lamb Excavation, Inc. v. Chase Manhattan Mortg. Corp.*, 208 Ariz. 478, 482, ¶ 15, 95 P.3d 542, 546 (App. 2004) (court may "find [dicta] persuasive when viewed in combination with the remainder of the court's analysis").

¶17 Third, the case on which Chavez relies for his argument that "wilfully" is the same as "intentionally," *Shumway v. Farley*, 68 Ariz. 159, 203 P.2d 507 (1949), was decided 29 years before Arizona adopted the Model Penal Code's ("MPC") definitions of culpable mental states in 1978, *see State v. Cox*, 217 Ariz. 353, 356, ¶ 16, 174 P.3d 265, 268 (2007) (discussing adoption of MPC mental states), and centered around the meaning

²See A.R.S. § 13-102(D) (2010) ("Except as otherwise expressly provided, or unless the context otherwise requires, the provisions of [Title 13] shall govern the construction of and punishment for any offense defined outside [Title 13]."). Chapter 3 of Title 28, which includes the crime of unlawful flight, does not define the term "wilfully." See A.R.S. § 28-601 (2004) (definitions).

of "wilful desertion" under the then-governing adoption statutes. *Shumway* did not compare culpable mental states in the criminal context, nor did it address the meaning of "knowingly," and it has no application to Chavez' criminal case.

¶18 Further, Chavez' argument that the use of the term "wilfully" in the unlawful flight statute pre-dated Arizona's adoption of the MPC's culpable mental states and did not change afterwards does not acknowledge that the definition of "wilfully" itself has changed. See generally *State v. Mikels*, 118 Ariz. 495, 497, 578 P.2d 174, 176 (1978) (discussing prior general statutory definition of "wilfully"); *State v. Tarzian*, 136 Ariz. 238, 241, 665 P.2d 582, 585 (App. 1983) (same). Moreover, the "Explanation" given regarding the enactment of A.R.S. § 13-102(D) -- which was adopted in 1978 and makes criminal definitions applicable to offenses outside Title 13 -- reflects that "[s]ubsection (D) intends to insure that [Title 13], particularly its mens rea [provisions] . . . apply to criminal offenses defined outside Title 13." Rudolph J. Gerber, *Criminal Law of Arizona* § 13-102, at 3 (1st ed. 1978) (emphasis added). Thus, although the word "wilfully" in the unlawful flight statute pre-dates Arizona's adoption of the MPC mental states, Chavez' reliance on *Shumway* is misplaced.

¶19 The superior court's instruction, therefore, did not constitute error, much less fundamental, prejudicial error.

¶10 For the foregoing reasons, we affirm Chavez' conviction.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
MAURICE PORTLEY, Judge