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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAMON HUMBERTO CHAVEZ, Appellant.	2 CA-CR 2011-0033 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100437001

Honorable Edgar B. Acuña, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Nicholas Klingerman
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes
Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Ramon Chavez was convicted of robbery and misdemeanor assault. The trial court found Chavez had two historical prior felony

convictions and sentenced him to an enhanced, presumptive term of ten years' imprisonment for the robbery conviction, with time considered served for the assault conviction.

¶2 On appeal, Chavez contends there was insufficient evidence to support his robbery conviction. He also alleges the court erred in instructing the jury that a defendant's flight, if proved, could be "considered . . . in the light of all other proved facts in deciding the question of his guilt or innocence." We affirm.

Discussion

¶3 "We view the facts and all reasonable inferences they permit in the light most favorable to sustaining the jury's verdict." *State v. Streck*, 221 Ariz. 306, ¶ 2, 211 P.3d 1290, 1290 (App. 2009). In December 2008, Damon V. and his friend, Joe L., arranged to meet at a local nightclub where Joe's girlfriend, Kristin T., was employed. The two men stayed at the club until closing time, when patrons were asked to leave and remove their vehicles from the club's parking lot. Because Damon and Joe had planned to wait for Kristin, they decided to move their vehicles to the parking lot of a nearby convenience store.

¶4 As Damon was leaving the club, he became uneasy when two other departing customers began questioning him about his sunglasses. These same two men, traveling together in a sport utility vehicle (SUV), also pulled in to the convenience store lot where Damon and Joe had parked. One of the men confronted Damon, pointed a gun at him, and demanded his keys, sunglasses, and cellular telephone. When Joe tried to intervene, the other man, later identified as Chavez, displayed a weapon and directed Joe back to his car. The unidentified man drove away in Damon's vehicle, and Chavez followed, driving the SUV. While Damon found a public telephone and called 9-1-1, Joe

followed both vehicles—which were travelling at a high rate of speed—to another convenience store, where Chavez again displayed a handgun and told Joe to leave.

¶5 When questioned that night, Joe described the assailant who twice had drawn a gun on him and had assisted in the robbery as "a Hispanic male in the mid- to late 20s [sic], five-nine, 160 pounds, muscular build, and . . . wearing a red baseball cap, red short-sleeved shirt over a white long-sleeved shirt, and jeans." He also said the man had tattoos on his forearms, including a "2" on his right arm and a "9" on his left arm. Damon had remembered the man as "wearing all red" with a "backwards hat."

¶6 Tucson Police Detective David Miller reviewed the club's security video and scanned identification cards which showed Chavez had been in the club that night, wearing a red baseball cap and a dark short-sleeved shirt over a long-sleeved red shirt, and had left shortly after Damon. Miller then assembled a photographic lineup that included a photograph of Chavez. When Damon viewed the lineup about a month after the incident, he "instantly" identified Chavez as the man who had assisted in the robbery. He also identified Chavez at trial. Chavez was charged with armed robbery, aggravated assault, and weapons misconduct. As he acknowledges on appeal, "[h]is defense at trial was mistaken identity." The jury found him guilty of the lesser-included offenses of robbery and assault and acquitted him of the weapons charge.

Robbery Conviction

¶7 On appeal, Chavez argues Damon's identification of him was "not supported by any corroborating evidence" and cites discrepancies between the descriptions Joe and Damon had provided and the club's security video, as well as details of the robbery that could not be corroborated by video of the parking lot. We review the

sufficiency of evidence presented at trial to determine if substantial evidence exists to support the jury's verdicts. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005).

¶8 Substantial evidence is that which reasonable minds could consider sufficient to establish beyond a reasonable doubt that the defendant committed the charged offenses. *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). We will not set aside a jury's verdict unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion[s] reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). And we review de novo the claim that the record lacks substantial evidence to support a jury's verdicts. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶9 Although Chavez cites *State v. Henderson*, 27 A.3d 872 (N.J. 2011), as supporting "the modern enlightened recognition of the general weakness of eyewitness identification evidence," neither that case nor any other authority he cites suggests an eyewitness's identification is insufficient, as a matter of law, to support a conviction. Moreover, the jury was told it was the state's burden to establish the reliability of Damon's identification, and the trial court provided factors relevant to its consideration of that issue. Jurors are presumed to follow the court's instructions, *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006), and it is within their province, not this court's, to determine the credibility of witnesses, *see State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007) ("'No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.'"), *quoting State v. Clemons*, 110 Ariz. 555, 556–57, 521 P.2d 987, 988-89 (1974).

Substantial evidence at trial supported the jury's verdicts, and we will not reweigh that evidence on review.[1]

Flight Instruction

¶10 Chavez also argues the trial court erred in providing the following instruction to the jury:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

Because Chavez failed to object to the instruction at trial, we review this claim only for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is that "'going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail on such a claim "a defendant must establish (1)

[1]To the extent Chavez also suggests the trial court should have entered a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., our review is essentially the same. We must decide "'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.'" *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). A judgment of acquittal should be granted only "[w]here there is a complete absence of probative facts to support a conviction." *Mathers*, 165 Ariz. at 66, 796 P.2d at 868. If reasonable minds could differ "'on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.'" *West*, 226 Ariz. 559, ¶ 18, 250 P.3d at 1192, *quoting State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. Smith*, 219 Ariz. 132, ¶ 21, 194 P.3d 399, 403 (2008).

¶11 Chavez contends the instruction was erroneous because his actions after the robbery did not evince "the type of concealment or evasion that is necessary to support a flight instruction." *See State v. Edwards*, 136 Ariz. 177, 184, 665 P.2d 59, 66 (1983) ("Before a flight instruction may be given, . . . there must be evidence of flight from which can be inferred a consciousness of guilt for the crime charged."). But Joe's report of Chavez and the other man travelling at a high rate of speed as he chased them certainly supports an inference that Chavez fled because of his "consciousness of guilt" for the robbery. *Id.*; *see also State v. Speers*, 209 Ariz. 125, ¶ 28, 98 P.3d 560, 567 (App. 2004) (flight instruction proper if court can "'reasonably infer from the evidence that the defendant left the scene in a manner which obviously invites suspicion or announces guilt'"), *quoting State v. Weible*, 142 Ariz. 113, 116, 688 P.2d 1005, 1008 (1984). We find no error, much less fundamental error, in the flight instruction given.

Conclusion

¶12 For the foregoing reasons, we affirm Chavez's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge