IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL S. TEGART,
Appellant.

No. 2 CA-CR 2015-0450
Filed August 17, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20150057001
The Honorable Casey F. McGinley, Judge Pro Tempore

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Following a jury trial, appellant Daniel Tegart was convicted of theft of a means of transportation, third-degree burglary, and possession of burglary tools. The trial court sentenced him to enhanced, concurrent prison terms, the longest of which is ten years. On appeal, the state has conceded that insufficient evidence supports Tegart's burglary tools conviction and that he was illegally sentenced as a category three repetitive offender rather than a category two offender. We accept these concessions, vacate the burglary tools conviction and Tegart's sentences, and remand for resentencing. We affirm Tegart's remaining convictions because we find evidentiary support for the jury instruction he challenges on appeal.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the convictions. *See State v. Wright*, 214 Ariz. 540, ¶ 2, 155 P.3d 1064, 1065 (App. 2007). On November 4, 2014, law enforcement officers executed a search warrant at the residence of J.F. as part of an unrelated criminal investigation. During that search they discovered Tegart hiding under a bed. He possessed a cell phone that contained several videos. The videos showed Tegart manipulating wires to start a vehicle that was taken from an automobile dealership. Officers later recovered this vehicle, a Lincoln SUV, and charged Tegart with burglarizing and stealing it, among other crimes.

¶3 The jury found Tegart guilty as noted above. The trial court determined he had two historical prior felony convictions and imposed "minimum," concurrent prison sentences pursuant to A.R.S. § 13-703(J).[1] This appeal followed.

Jury Instruction

¶4 The trial court provided the following instruction over Tegart's objection:

> In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's hiding or concealing evidence, together with all the other evidence in the case. Hiding or concealing evidence after a crime has been committed does not by itself prove guilt.

On appeal, Tegart argues this instruction lacked evidentiary support "because there was no nexus between [his] act of hiding and the theft of the SUV" in the current case.[2]

¶5 Our case law establishes that when a defendant conceals either himself or evidence of a crime, his actions might

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[1]Unless otherwise indicated, we cite the current versions of all applicable statutes because no revisions material to this decision have occurred since Tegart's offenses.

[2] Although the state maintains Tegart failed to raise this specific contention below, we find he adequately stated the grounds of his objection and thus preserved the alleged error under Rule 21.3(c), Ariz. R. Crim. P. The "purpose of requiring a specific objection is to afford the trial court an opportunity to pass upon [it]." *State v. Schilleman*, 125 Ariz. 294, 298, 609 P.2d 564, 568 (1980). In overruling Tegart's objection, the trial court necessarily considered and rejected his claims that the officers who discovered him at the residence "were there for a completely different reason" and that his act of hiding under the bed was "unlinked to the crime."

display a consciousness of guilt from which a jury may infer that he is actually guilty. *See State v. Edwards*, 136 Ariz. 177, 184, 665 P.2d 59, 66 (1983); *State v. Hunter*, 136 Ariz. 45, 48-49, 664 P.2d 195, 198-99 (1983); *State v. Van Alcorn*, 136 Ariz. 215, 218, 665 P.2d 97, 100 (App. 1983). A jury instruction is thus warranted if the evidence allows "a reasonable inference . . . that the accused utilized the element of concealment or attempted concealment." *State v. Smith*, 113 Ariz. 298, 300, 552 P.2d 1192, 1194 (1976). Before a jury may be instructed on this permissive inference, however, our supreme court has suggested that "there must be evidence . . . from which can be inferred a consciousness of guilt *for the crime charged*." *State v. Bible*, 175 Ariz. 549, 592, 858 P.2d 1152, 1195 (1993), *quoting Edwards*, 136 Ariz. at 184, 665 P.2d at 66.

¶6 With respect to this "nexus," as Tegart describes it, the current case is similar to *State v. Mills*, 18 Ariz. App. 253, 501 P.2d 429 (1972). There, the police executed a search warrant for stolen property at a house where the defendant purportedly did not live. *Id.* at 254, 501 P.2d at 430. When the police showed the defendant the search warrant, he fled the house with a plastic container that he proceeded to throw away. *Id.* Police soon recovered this item and found that it contained marijuana. *See id.* The defendant claimed, in essence, that he was merely present at the house and had fled the scene because he was "scared" by the search warrant since "he knew nothing about any stolen property." *Id.* At the defendant's trial for possession of marijuana, the court gave a flight instruction to the jury similar to the concealment instruction given in this case. *See id*.

¶7 Under the facts of *Mills*, we determined the trial court properly gave the instruction. *Id.* at 255, 501 P.2d at 431. We reasoned that evidence of the crime of possession of marijuana was properly before the jury and that it was unnecessary to show the police knew of the defendant's marijuana offense when he attempted to flee or conceal the evidence. *Id.* Other cases similarly hold that an alternative explanation for a defendant's incriminating conduct—including consciousness of guilt of an unrelated crime—does not preclude a flight or concealment instruction, but merely presents a factual question to be resolved by the jury. *See, e.g.*, *State v. Parker*, 231 Ariz. 391, ¶ 50, 296 P.3d 54, 67 (2013); *State v. Tison*, 129

Ariz. 526, 539-40, 633 P.2d 335, 348-49 (1981); *State v. Earby*, 136 Ariz. 246, 248, 665 P.2d 590, 592 (App. 1983).

¶8 Here, as in *Mills*, the evidence showed Tegart attempted to evade law enforcement officers and concealed evidence of a crime for which he was on trial. His own brief acknowledges that his acts of concealment "invited an inference of guilt . . . related to . . . evidence at the residence," which included the incriminating cell phone videos. On this record, the trial court correctly determined that Tegart's conduct allowed a reasonable inference of a consciousness of guilt of the current charges. *See Bible*, 175 Ariz. at 592, 858 P.2d at 1195. The court therefore did not err in providing the instruction.

Conceded Issues

¶9 As to the remaining issues Tegart raises on appeal, we accept the state's concessions of reversible error. *See State v. Solis*, 236 Ariz. 242, ¶ 23, 338 P.3d 982, 989 (App. 2014) (recognizing that appellate court is not bound by state's concessions). We agree with Tegart and the state that the "red wire" he used to steal the vehicle, which served as the basis for his conviction on count five of the indictment, did not meet the definition of a burglary tool under A.R.S. § 13-1505(A)(2) and the particular facts of this case. We also agree that the state proved Tegart had only one historical prior felony conviction, because his two felony convictions committed on the same occasion in Pima County No. CR20012935 only could be counted as one prior conviction under § 13-703(L), and his conviction in Pima County No. CR20040253 consequently did not qualify as a historical prior felony conviction under A.R.S. § 13-105(22)(d), 2012 Ariz. Sess. Laws, ch. 190, § 1. In light of the state's concessions, we need not address these issues further. *See State v. Virgo*, 190 Ariz. 349, 350-51, 947 P.2d 923, 924-25 (App. 1997).

¶10 Tegart suggests, however, without offering any supporting authority, that this court should modify his sentences on appeal by reducing them to minimum sentences under § 13-703(I), consistent with the trial court's apparent intentions. The state asserts, also without any legal support, that we should instead remand for resentencing under this subsection.

¶11 A sentence that is enhanced above the statutorily authorized range constitutes an illegal sentence, *see State v. Provenzino*, 221 Ariz. 364, ¶ 18, 212 P.3d 56, 61 (App. 2009), and we have stated that "[a]n illegal sentence is no sentence at all." *State v. Pyeatt*, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. 1982); *accord State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984). When an illegal sentence is discovered on appeal, the most appropriate remedy is to remand for resentencing, *see, e.g.*, *State v. Norris*, 221 Ariz. 158, ¶¶ 10-11, 211 P.3d 36, 39-40 (App. 2009); *State v. Cruz*, 27 Ariz. App. 44, 46-47, 550 P.2d 1086, 1088-89 (1976), so the error can be resolved in the same manner as if it were discovered in the trial court, pursuant to Rule 24.3, Ariz. R. Crim. P. *See State v. Anderson*, 171 Ariz. 34, 36, 827 P.2d 1129, 1131 (1992) ("[T]he proper method of correcting an illegal sentence is not by minute entry, but in open court with the defendant present."). Although this process may at times seem like an inefficient formality, *see Anderson*, 171 Ariz. at 36-37, 827 P.2d at 1131-32 (Corcoran, J., specially concurring), it ensures a public disposition of criminal matters, with notice to both defendants and crime victims alike, and it avoids the need for an appellate court to divine a trial court's intentions. Therefore, following our supreme court's prescription in *Anderson*, we remand this case for resentencing rather than modifying the illegal sentences pursuant to A.R.S. § 13-4037(A).

Disposition

¶12 For the reasons stated, we vacate Tegart's conviction and sentence on count five for possession of burglary tools, as well as the sentences imposed for his remaining convictions. We affirm those remaining convictions and remand the case to the trial court to resentence Tegart under § 13-703(I) as a category two repetitive offender.