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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 1/31/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0765
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JULIO ALBERTO MIRAMONTES,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-180109-003

The Honorable Daniel G. Martin, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

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Attorney for Appellant

G E M M I L L, Judge

¶1 A jury found Julio Alberto Miramontes guilty of kidnapping, a class two felony. Miramontes argues on appeal the trial court erred concerning two jury instructions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 On appeal, we view the facts "in the light most favorable to sustaining the verdict." *State v. Moody*, 208 Ariz. 424, 435 n. 1, ¶ 1, 94 P.3d 1119, 1130 n. 1 (2004) (citation omitted).

¶13 In the early morning of December 28, 2009, Miramontes picked up Alvaro Serrano and Miguel Valdez in a Grand Marquis. Miramontes was 23 years old at that time; Serrano and Valdez were both 16 years old. Miramontes had enlisted Serrano and Valdez to help kidnap a guy who "owed him some money and drugs."

¶14 When Miramontes could not find his intended target, he followed the victim, believing her to be the man's wife. At 8:30 a.m., the victim stopped at her mother's house where she was intending to drop off her son. At that point, Serrano pulled the victim out of her car and forced her into the Grand Marquis at gunpoint. Miramontes made the decision to take the victim and gave all the orders to Serrano and Valdez.

¶15 Miramontes drove to an abandoned home, and the victim was placed in a dark closet. Miramontes questioned the victim, who insisted the kidnappers had mistaken her husband for someone else. Miramontes agreed to let the victim call her mother. During the phone call, a police officer tried to talk with the victim. Miramontes immediately took the phone away, told Serrano and Valdez to watch the victim, and left the abandoned

house. Serrano testified that Miramontes was only at the abandoned home for ten or fifteen minutes.

¶16 Based on the license plate taken by a neighbor, the police were able to identify the Grand Marquis. The car was registered to Miramontes' sister, Araceli. At approximately 11:00 a.m. on the same day, Araceli called the police to report her vehicle had been stolen during the night. When officers arrived to interview Araceli, Miramontes was also present at the home. According to the testifying officer, Miramontes kept interjecting and trying to lead the conversation. Miramontes insisted the car was stolen during the night. When officers later processed the Grand Marquis, they did not discover anything to indicate the car was stolen.

¶17 Police located the Grand Marquis at the abandoned home later that afternoon. Officers rescued the victim at the abandoned home and arrested Serrano and Valdez as they were fleeing. Serrano and Valdez confessed to their participation and explained Miramontes' involvement in the kidnapping to the police. When police returned to Miramontes' home, they found no one there, and a neighbor informed the officers that the family had moved out. Araceli's testimony confirmed that Miramontes left and did not return to the house. Police spent several weeks looking for Miramontes and placed a "file stop" on Miramontes noting that he was a person of interest in a crime.

Police arrested Miramontes seven months later following a traffic stop.

¶18 At trial, Araceli provided testimony for Miramontes' alibi defense. She testified that Miramontes did not leave the house before the kidnapping. Araceli explained that, because she was pregnant at the time, she went to the bathroom every 15 to 20 minutes and would have known if Miramontes had left the house.

¶19 Miramontes was convicted of kidnapping, a class two felony, and the jury concluded it was a dangerous offense. The jury further concluded the state had proven two aggravating factors - involvement of an accomplice and harm to the victim. Miramontes was sentenced to a 12.5 year prison term with 455 days credit for presentence incarceration.

¶10 Miramontes timely appeals. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") §§ 12-120.21 (A)(1)(2003) and 13-4033 (A)(1)(2010)¹.

DISCUSSION

¶11 Miramontes argues on appeal the trial court erred by a) denying his proposed alibi jury instruction and b) providing the jury with a flight instruction.

¹ We cite the current version of statutes when no material revisions have occurred since the events in question.

A. Alibi Instruction

¶12 At the trial court, Miramontes requested the specific alibi instruction discussed in *State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998). The source of the *Rodriguez* instruction was the second edition of the Revised Arizona Jury Instructions ("RAJI"), Criminal 11. The *Rodriguez* instruction provides:

The defendant has produced evidence of being absent at the time and place the alleged crime was committed. If you have a reasonable doubt whether the defendant was present at the time and place the alleged crime was committed, you must find the defendant not guilty.

192 Ariz. at 64, ¶ 30, 961 P.2d at 1012.

¶13 The trial court acknowledged that *State v. Rodriguez* was still good law but explained that the court could not find the *Rodriguez* Instruction in the current edition of the RAJI. The court concluded that at some point the instruction had been intentionally removed, and therefore, there was currently no "approved instruction on alibi." The court acknowledged, however, that there was a legitimate concern that the jury might shift the burden to Miramontes to prove his alibi defense. The court, therefore, gave this instruction to the jury:

The defendant is not required to prove that he was not present at the time and place the alleged crime was committed. The burden is always on the State to prove each element of the offense with which the defendant is charged beyond a reasonable doubt.

¶14 We review instructions as a whole to determine if they accurately reflect the law. *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). We will not reverse a jury verdict on the grounds of an erroneous instruction unless the instructions taken as a whole could reasonably mislead a jury. *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). If a jury instruction is substantially free from error, the defendant generally suffers no prejudice from its wording. *Id.*

¶15 Miramontes challenges the trial court's decision to deny his proposed alibi jury instruction. Miramontes argues the alibi instruction given by the court was inadequate because it did not specifically include the language from *Rodriguez* that the jury "must find the defendant not guilty," if they have reasonable doubt whether the defendant was present when the crime was committed. Therefore, Miramontes argues the instruction did not adequately explain the State's burden. We disagree.

¶16 The trial court did not err in using its own alibi instruction, instead of the specific *Rodriguez* instruction. In *Rodriguez*, the Arizona Supreme Court reversed a defendant's conviction after the trial court denied his request for an alibi instruction. 192 Ariz. at 62, ¶ 21, 961 P.2d at 1010. The court found the defendant presented sufficient evidence to support his alibi defense. *Id.* at 61-62, ¶¶ 16-20, 961 P.2d at

1009-10. The court reasoned that a separate alibi instruction was needed to address "the fundamental risk that the jury may interpret the defendant's failure to prove his alibi as proof of guilt." *Id.* at 63, ¶ 25, 961 P.2d at 1011. The court concluded that the requested RAJI instruction properly "reframe[d] the burden of proof in the context of appellant's alibi theory." *Id.* at 64, ¶ 30, 961 P.2d at 1012. Moreover, given the "lack of overwhelming proof of guilt and the importance of the alibi defense," the court found the error was not harmless and required reversal. *Id.* at 63, ¶ 27, 961 P.2d at 1011.

¶17 The trial court's alibi instruction in this case properly addressed the principal concern in *Rodriguez* that a jury might shift the burden to Miramontes and consider his failure to prove his alibi defense as proof of his guilt. The instruction made clear that the "defendant [was] not required to prove" his alibi defense. Furthermore, the instruction clarified that "the burden is always on the State to prove each element of the offense . . . beyond a reasonable doubt." The instruction is plain that the jury could not convict Miramontes of kidnapping unless the State had proven each element beyond a reasonable doubt. If the jury had a reasonable doubt about whether Miramontes was present when the offense occurred, the State would not have proven each element. The instruction satisfies the *Rodriguez* concern that the burden of proof should

not shift to the defendant, and therefore the instruction accurately reflects the law. Although Miramontes' specific instruction was denied, it has long been held that a defendant is not entitled to jury instructions in language precisely to his liking, as long as the actual instructions are adequate. *Hoskins*, 199 Ariz. at 146, ¶ 78, 14 P.3d at 1016.

¶18 In addition, both counsel explained and emphasized the State's burden of proof during closing argument. See *State v. Johnson*, 205 Ariz. 413, 417, ¶ 11, 72 P.3d 343, 347 (App. 2003) (explaining we will consider jury instructions "in context and in conjunction with the closing arguments of counsel") (citation omitted). Defense counsel emphasized that the State must prove its case "beyond a reasonable doubt," which is the "highest [legal standard] there is." The State acknowledged its burden during closing argument stating: "The defense has raised an alibi defense saying he was somewhere else at the time. He doesn't have to prove that to you. What I need to prove to you is that he was there." These closing arguments further supported the important point that Miramontes did not have to prove his alibi defense.

¶19 We note for clarification that, contrary to the court's explanation, the current edition of the criminal RAJI does include the *Rodriguez* instruction. See RAJI (Criminal) 43 (3rd ed. Supp. 2011). The trial court was correct in noting that

the alibi instruction was excluded in both the second and third editions of the criminal RAJI. The alibi instruction, however, was added in the third edition cumulative supplement published in June 2011, near the time of Miramontes' trial. Although Miramontes requested the *Rodriguez* instruction, he did not inform the court of the newly added alibi instruction. Regardless of the trial court's reference to older RAJIs, as explained above we conclude the court did not err in using an alibi instruction of its own creation.

B. Flight Instruction

¶20 Miramontes argues the trial court erred in providing the jury with a flight instruction. The flight instruction given the jury was as follows:

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 of the other evidence in the case.

Miramontes did not object to the flight instruction at trial; therefore, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19-20, 115 P.3d 601, 607 (2005). To prevail under fundamental error review, a defendant must establish both fundamental error and that the error caused him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607.

¶21 A party is entitled to a jury instruction if supported

by any theory of the evidence. *Rodriguez*, 192 Ariz. at 61, ¶ 16, 961 P.2d at 1009. A flight instruction may be given if the evidence shows either open flight or concealment. *State v. Hunter*, 136 Ariz. 45, 48-49, 664 P.2d 195, 198-99 (1983). A flight instruction is appropriate if "the defendant left the scene in a manner which obviously invites suspicion or announces guilt." *State v. Weible*, 142 Ariz. 113, 116, 688 P.2d 1005, 1008 (1984).

¶122 There are at least two aspects of the facts here that support the giving of the flight jury instruction. First, Serrano testified that Miramontes abruptly left the abandoned home when he realized that the police were looking for the victim. Miramontes left the house soon after he heard a police officer identify himself on the phone when the victim called her mother. Although the police were not yet pursuing Miramontes, he knew that the police were already attempting to locate the victim. Even without pursuit, a defendant's manner of leaving the scene may manifest consciousness of guilt. *State v. Lujan*, 124 Ariz. 365, 371, 604 P.2d 629, 635 (1979).

¶123 Second, police officers testified and Araceli confirmed that Miramontes immediately left the family home after he and Araceli reported the stolen vehicle. A neighbor informed the police that the entire family, in fact, had moved out of the home. The jury could infer they moved so that police officers

could not find Miramontes or question the family about Miramontes' whereabouts. This evidence is sufficient to show concealment and hiding, and the jury was entitled to evaluate whether such conduct manifested a consciousness of guilt. *Cf. State v. Clark*, 126 Ariz. 428, 434-35, 616 P.2d 888, 894-95 (1980) (concluding the manner in which defendant left his home evidenced guilt, even without pursuing police).

¶24 The evidence sufficiently supports the trial court's decision to include a flight instruction. The trial court did not err in providing a flight instruction to the jury.

CONCLUSION

¶25 For the foregoing reasons, we affirm the conviction and sentence.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Judge

_____/s/_____
DONN KESSLER, Judge