

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



DIVISION ONE
FILED: 10/16/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 11-0875
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ROBIN DENIS HANNON,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-120784-001 DT

The Honorable Karen L. O'Connor, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
by Kent E. Cattani, Division Chief Counsel,
and Joseph T. Maziarz, Section Chief Counsel
Criminal Appeals Section
Attorneys for Appellee

Marty Lieberman, Office of the Legal Defender Phoenix
by Cynthia Dawn Beck, Deputy Legal Defender
Attorneys for Appellant

H O W E, Judge

¶1 Robin Denis Hannon appeals his conviction for aggravated assault. He argues that the trial court erred in

providing the jury with a flight instruction because the evidence did not support it. We find no error.

FACTS AND PROCEDURAL HISTORY

¶2 In December 2009, the victim and three of his friends, Codi, Kyle, and Tara, were in downtown Phoenix. While waiting for another friend, Dale, to meet them, they saw Hannon near them at a street corner. The victim recognized Hannon because they had previously met through a mutual friend. The victim greeted Hannon, but their conversation turned confrontational.

¶3 Dale approached the group and saw Hannon arguing with the victim. As the victim turned to walk away, Hannon lunged at him and slapped his face. The victim fell to the ground, landing on his hip. Hannon jumped on top of him and prepared to strike him again.

¶4 Dale yelled for Hannon to get off of the victim, and pulled him off. Hannon turned toward Codi and raised his fist as if to hit her but did not, and ran away. Dale chased Hannon but lost sight of him. Even though police officers were near, no one spoke to the police about the incident.

¶5 The following day, the victim experienced intense pain in his hip and went to the hospital. Doctors determined that his femur was broken and surgically repaired it. While at the hospital, the victim contacted the police about Hannon's assault.

¶6 Hannon was charged with one count of aggravated assault, a class 4 felony. Before trial, the State proposed that the trial court give the following instruction on “flight or concealment”:

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, together with all the other evidence in the case. You may also consider the defendant’s reasons for running away. Running away after a crime has been committed does not, by itself prove guilt.

¶7 After confirming that a flight or concealment instruction is appropriate whenever a defendant’s flight from a crime may show a consciousness of guilt, defense counsel told the court that he did not object to the proposed instruction. The court read the instruction to the jury, without objection. Hannon was found guilty of aggravated assault. The court imposed a suspended sentence and placed him on three years’ probation.

¶8 Hannon timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(1), 13-4031, and -4033(A) (Westlaw 2012).¹

¹ Absent material revisions to this decision, we cite the current version of applicable statutes.

DISCUSSION

¶9 Hannon argues that the evidence at trial did not support a flight instruction. We review de novo whether the jury was properly instructed. *State v. Nelson*, 229 Ariz. 180, 185, ¶ 21, 273 P.3d 632, 637 (App. 2012). Because Hannon did not object to this instruction at trial, however, he has waived any error, Ariz. R. Crim. P. 21.3(c), and we review only for fundamental error, *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is “error 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.* To prevail under fundamental error review, an appellant must prove that fundamental error exists and that the error caused him prejudice. *Id.* at ¶ 20.

¶10 We find no fundamental error because we find no error. See *State v. Silva*, 222 Ariz. 457, 459, ¶ 11, 216 P.3d 1203, 1205 (App. 2009) (Before reviewing for fundamental error, we must first find that error occurred.) A party is entitled to a jury instruction if supported by any theory of the evidence. *State v. Rodriguez*, 192 Ariz. 58, 61, ¶ 16, 961 P.2d 1006, 1009 (1998). 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). Leaving the scene is

considered flight if the manner of leaving suggests a consciousness of guilt. *Id.* "Running from the scene of a crime, rather than walking away, may provide evidence of a guilty conscience prerequisite to a flight instruction." *State v. Lujan*, 124 Ariz. 365, 371, 604 P.2d 629, 635 (1979).

¶11 The evidence presented at trial supported the flight instruction. Hannon and other witnesses testified that he ran away from the scene after he hit the victim. Hannon testified that after the blow, he immediately started running. Other witnesses also testified that Hannon ran after hitting the victim. A reasonable jury could conclude that such manner of flight manifested a consciousness of guilt.

¶12 Moreover, even if Hannon could show that the trial court erred in giving the instruction, he cannot show that the instruction prejudiced him. The instruction was phrased permissively; the jury was instructed that they "may" consider evidence of Hannon's running away and that running away from a crime did not necessarily prove guilt. The jury was further instructed to consider the evidence "with all other evidence in the case." As instructed, Hannon was not prejudiced. On this record, we find no error, let alone fundamental error.

