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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

FRANK BONILLA, *Appellant*.

No. 1 CA-CR 16-0432
FILED 7-27-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-107165-001
The Honorable Alfred M. Fenzel, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Rena P. Glitsos
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

C A T T A N I, Judge:

¶1 Frank Bonilla appeals his conviction and sentence for one count of possession of a dangerous drug. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In December 2014, Tempe Police Officer Pettengell was surveilling a residence as part of an unrelated investigation when a blue sedan approached. A passenger in the car went into the residence then back to the car twice, carrying something in his hands both times. Officer Aleksis followed the car after it left the residence, and pulled the car over for a traffic violation.

¶3 Officer Aleksis obtained identification from the driver of the vehicle and from Bonilla, the passenger. Warrant checks on the driver and Bonilla came back negative. Officers Johnson and Ribotta arrived at the scene of the traffic stop, and the officers decided to have Officer Ribotta's drug detection dog conduct an exterior sniff of the car.

¶4 The officers asked Bonilla and the driver to step out of the car, and Officer Ribotta asked Bonilla if he had any weapons. As Officer Ribotta began to pat down Bonilla's waist to ensure that he was not concealing a weapon, Bonilla spun around and ran away. Bonilla took off his jacket as he ran and dropped it on the sidewalk. Officer Johnson followed Bonilla and arrested him in a nearby alley.

¶5 One of the officers searched the discarded jacket and found in the right front pocket a small plastic bag that contained a white substance. A laboratory analysis later confirmed that the bag contained 1.31 grams of methamphetamine. Bonilla was charged with possession of a dangerous

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drug, a class 4 felony. *See* Ariz. Rev. Stat. (“A.R.S.”) §§ 13-3401(6)(c)(xxxviii), -3407(A)(1).¹

¶6 The superior court held a three-day jury trial on the possession charge. Bonilla did not present any evidence; his defense was that the State had failed to meet its burden of proof.

¶7 The parties disagreed on a proposed flight instruction. The State requested the court instruct the jury 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 the other evidence in the case. Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.

See Rev. Ariz. Jury Instr. (“RAJI”) Stand. Crim. 9 (“Flight or Concealment”). Bonilla requested that, in addition to the State’s requested language, the court include the optional additional language in RAJI Standard Criminal 9, which instructs the jurors that they “may also consider the defendant’s reasons for running away, hiding, or concealing evidence.” *Id.* The court gave the instruction as requested by the State because Bonilla had not presented evidence as to his reasons for fleeing.

¶8 The jury convicted Bonilla as charged and the court sentenced him to a mitigated 6-year prison term. Bonilla timely appealed, and we have jurisdiction under A.R.S. § 13-4033.

DISCUSSION

¶9 Bonilla asserts that the court erred by giving the flight instruction without his requested additional language regarding reasons for fleeing. His argument fails, however, because he did not present any evidence of his reasons for fleeing, and the additional language from the RAJI instruction was thus unnecessary.

¶10 We review the superior court’s denial of a defendant’s requested jury instruction for an abuse of discretion, and will “defer to the trial judge’s assessment of the evidence.” *State v. Wall*, 212 Ariz. 1, 3, 5, ¶¶ 12, 23 (2006). “A party is entitled to an instruction on any theory reasonably

¹ Absent material revisions after the relevant date, we cite a statute’s current version.

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supported by evidence.” *State v. LaGrand*, 152 Ariz. 483, 487 (1987). However, the court may reject any instruction that lacks a factual basis. *State v. Vandever*, 211 Ariz. 206, 208, ¶ 7 (App. 2005).

¶11 A flight instruction is appropriate “[i]f the evidence [of] a defendant’s manner of leaving the scene of a crime reveals a consciousness of guilt.” *State v. Salazar*, 173 Ariz. 399, 409 (1992). As described in the use note to RAJI Standard Criminal 9, the optional additional language – which instructs the jurors that they may consider the defendant’s other possible reasons for flight – may be included if requested by the defendant and supported by the evidence.

¶12 The evidence presented at trial did not support Bonilla’s requested version of the instruction. The only testimony about the traffic stop and Bonilla’s flight came from the three officers who observed him run away and drop his jacket. Bonilla argues that he was entitled to the requested instruction because Officer Johnson testified that Bonilla appeared nervous during the traffic stop, demonstrating that he may have fled because he was nervous. But Officer Aleksis testified that while nervousness is a common reaction to police encounters, fleeing the scene is not, and Bonilla did not offer contrary evidence. Thus, the superior court did not err by concluding that there was no factual basis for Bonilla’s requested instruction.

¶13 Furthermore, any possible error in failing to give Bonilla’s requested instruction was harmless. *See State v. Valverde*, 220 Ariz. 582, 585, ¶ 11 (2009); *State v. Solis*, 236 Ariz. 285, 287–88, ¶¶ 12–14 (App. 2014). The instruction as given did not preclude the jury from considering other reasons Bonilla may have run away, and Bonilla’s counsel told the jury that they could consider other reasons, including that he might have been scared. *See Valverde*, 220 Ariz. at 586, ¶ 16 (“In assessing the impact of an erroneous instruction, we also consider the attorneys’ statements to the jury.”). And in any event, Bonilla’s reasons for fleeing would not have changed the fact that he was seen dropping a jacket that contained a bag of methamphetamine. Accordingly, even if it were error to refuse Bonilla’s requested instruction, any such error was harmless.

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CONCLUSION

¶14 For the foregoing reasons, Bonilla's conviction and sentence are affirmed.



AMY M. WOOD • Clerk of the Court
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