

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

KUTTER BO OPENSHAW, *Appellant*.

No. 1 CA-CR 17-0756
FILED 8-21-2018

Appeal from the Superior Court in Maricopa County
No. CR2017-118135-001
The Honorable James R. Rummage, Judge *Pro Tempore*

AFFIRMED

COUNSEL

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

Maricopa County Public Defender's Office, Phoenix
By Mark E. Dwyer
Counsel for Appellant

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Jennifer M. Perkins joined.

S W A N N, Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), from Kutter Bo Openshaw's conviction for assault and the superior court's imposition of probation. Neither Openshaw nor his counsel identify any issues for appeal. We have reviewed the record for fundamental error. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999). We find none.

¶2 Openshaw was indicted for aggravated assault. He pled not guilty, and the matter proceeded to a jury trial.

¶3 At trial, the state presented evidence of the following facts. On the evening of April 2, 2017, R.Y. drove his tow truck to a Mesa address to repossess a car. R.Y. located the car, pulled it out of its parking spot, released it, and began to back his truck up to its front wheels. Suddenly, Openshaw (who was not the debtor) ran up to the truck. Screaming, cursing, and holding a wooden stick or sword, Openshaw shoved his cell phone through the truck's window and refused to comply with R.Y.'s directions to move away. R.Y. exited the truck, backed Openshaw off, and worked to enter the car and release its parking brake. R.Y. then returned to the truck. Openshaw again approached and shoved his hand through the truck's window. R.Y. exited the truck and unsuccessfully tried to grab Openshaw's phone. When Openshaw jumped on top of the car, R.Y. returned to the truck and closed its "claws" around the car. Openshaw fell, and R.Y. exited the truck to check on him. Openshaw rose, held his phone to R.Y.'s face, and began striking R.Y.'s legs with the stick. When R.Y. again tried to grab the phone, Openshaw jabbed the stick into R.Y.'s side. R.Y. then placed Openshaw in a headlock. When a police helicopter arrived and turned on a spotlight, Openshaw broke free and ran.

¶4 R.Y. spoke to police at the scene and showed them scratches on his side and legs. Soon thereafter, Openshaw called police to report R.Y. as the aggressor. An officer met Openshaw at a hospital and noted that he

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appeared to be intoxicated. Openshaw expressed his belief that police had seized his stick, which he claimed was valuable.

¶5 The court denied Openshaw's motion for a judgment of acquittal under Ariz. R. Crim. P. ("Rule") 20. Over Openshaw's objection, the court instructed the jury on flight. The jury found Openshaw guilty of the lesser-included offense of assault. The court sentenced Openshaw to 364 days of unsupervised probation.

¶6 We detect no fundamental error. Openshaw was present and represented at all critical stages. The jury was properly comprised under A.R.S. § 21-102 and was properly instructed.¹ The jury's verdict was supported by sufficient evidence. A person commits assault by "intentionally, knowingly or recklessly causing any physical injury to another person." A.R.S. § 13-1203(A)(1). Here, the state's evidence established that Openshaw deliberately swung and jabbed a stick at R.Y., and that R.Y. sustained scratches as a result. The court imposed a lawful probation term for the assault under A.R.S. §§ 13-901(A), -902(A)(5), and -1203(A)(1) and (B).

¹ The flight instruction to which Openshaw objected was supported by the evidence. A jury is properly instructed on flight if the state's evidence permits the inference that the defendant was conscious of his or her guilt of the crime charged. *State v. Parker*, 231 Ariz. 391, 403, ¶ 44 (2013). Evidence that the defendant left the scene of the crime is, by itself, insufficient to support a flight instruction. *State v. Clark*, 126 Ariz. 428, 434 (1980). But when the defendant's manner of leaving the scene reveals consciousness of guilt, by "evidence of open flight as upon pursuit, or . . . evidence of concealment," the flight instruction is warranted. *Id.* Here, the state's evidence established that Openshaw fled the scene upon law enforcement's arrival.

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¶7 We affirm. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Openshaw of the status of this appeal and his future options. *Id.* Openshaw has 30 days from the date of this decision to file a petition for review *in propria persona*. *See Rule 31.21(b)(2)(A)*. Upon the court's own motion, Openshaw has 30 days from the date of this decision in which to file a motion for reconsideration. *See Rule 31.20(c)*.



AMY M. WOOD • Clerk of the Court
FILED: AA