

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/25/10
PHILIP G. URRY, CLERK
BY: JT

STATE OF ARIZONA,) 1 CA-CR 09-0067
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
WILLIAM ANAYA PAGAN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-134287-001 DT

The Honorable Cari A. Harrison, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Julie A. Done, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Judge

¶1 William Anaya Pagan ("Appellant") appeals from his convictions and sentences for burglary in the third degree and theft. He argues that the trial court's "flight or concealment"

jury instruction was unsupported by the evidence and therefore violated his right to due process. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 A Maricopa County grand jury charged Appellant by indictment with Count I, burglary in the third degree, a class four felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-1506 (Supp. 2009)¹; and Count II, theft, a class six felony in violation of A.R.S. § 13-1802 (Supp. 2009). Before trial, the trial court granted the State's motion to amend Count II to allege a class one misdemeanor.

¶13 The evidence presented at trial indicated as follows²: On June 3, 2008, Appellant and a woman, who had been hired as temporary workers, arrived at an elementary school, where they began the task of moving furniture and boxes between classrooms. Later that morning, a teacher assigned to a classroom from which items were being moved noticed that her classroom's laptop computer and its cords were missing. The teacher searched for the missing computer and contacted other employees who might have moved it, then notified the school principal. The principal continued the

¹ We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

² We view the facts in the light most favorable to sustaining the convictions, and we resolve all reasonable inferences against Appellant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

search, eventually finding the computer in Appellant's backpack, which had been left in the teachers' lounge.

¶14 Appellant had initially denied having the missing computer, but when confronted by the principal, he acknowledged that he owned the backpack in which the computer was found. He explained, however, that he had purchased the computer for twenty dollars from someone on the school's campus.³ Appellant was taken to an isolated office area to await the police.

¶15 After police officers arrived at the school, they questioned several potential witnesses and Appellant. Appellant admitted to the police that the backpack containing the laptop computer belonged to him, but he again claimed to have purchased the computer for twenty dollars from a man at the school.

¶16 While searching for the missing laptop computer, the teacher had noted that Appellant, who was wearing baggy pants, appeared to have "stuffed his pockets with something." After the police arrested Appellant, however, they searched his pockets and found nothing. The principal ultimately found the stolen computer's cords hidden in the room where Appellant had waited for the police.

¶17 Appellant testified at trial and denied taking the computer or knowing it was stolen. Instead, he asserted that he had purchased the computer for twenty dollars from a man at the

³ At trial, the parties stipulated that the depreciated value of the computer was approximately \$280.

school during a "smoke break," and that he had put it in his backpack. He further asserted that he put the computer's cords in his pockets after the purchase and gave the cords to the police when they arrived. Appellant also admitted having two prior felony convictions.

¶18 Following the defense's case, the parties settled final jury instructions. Among the instructions the State had requested was a "flight or concealment" instruction. Although Appellant objected to some of the State's proposed instructions, he did not object to that particular instruction. The trial court instructed the jury in pertinent part as follows:

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

¶19 The jury convicted Appellant of burglary in the third degree and theft as charged. After determining that Appellant had two prior felony convictions for enhancement purposes, the trial court sentenced Appellant to a fully mitigated term of six years' incarceration in the Arizona Department of Corrections for Count I,

with credit for thirty-six days of pre-sentence incarceration, and a terminal disposition with credit for time served for Count II.⁴

¶10 We have jurisdiction over Appellant's timely appeal. See Ariz. Const. art. 6, § 9; A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), -4033(A)(1) (Supp. 2009).

ANALYSIS

¶11 Appellant argues that the trial court erred in instructing the jury on "concealment of evidence and flight," resulting in a violation of his right to due process, because the instruction was unsupported by the evidence. He maintains that "[n]either flight nor concealment applied under the facts of this case" because the evidence presented showed that he made no attempt to flee or hide when asked to wait in the office area for the police to arrive, and "[t]he fact that he openly carried the laptop to the teacher's lounge and placed it in a backpack for safekeeping did not constitute concealment," especially because "[t]he laptop was not wrapped up in anything or covered by items in the backpack."

¶12 We review *de novo* whether jury instructions properly state the law. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325,

⁴ We note that the trial court failed to find two or more mitigating factors as required before sentencing Appellant to the fully mitigated sentence imposed. See A.R.S. §§ 13-701(E) (Supp. 2009), -703(C), (G), (J) (Supp. 2009). However, the State has not filed a timely cross-appeal and therefore has waived any contention of error. See *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990).

1327 (1997). The absence of any evidence supporting a reasonable inference of open flight or that the accused utilized the element of concealment or attempted concealment may be considered prejudicial error upon timely objection. *State v. Smith*, 113 Ariz. 298, 300, 552 P.2d 1192, 1194 (1976). Because Appellant raised no objection to the flight or concealment instruction in the trial court, however, he has waived his argument, see Ariz. R. Crim. P. 21.3(c), including any constitutional objection, see *State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981), absent fundamental, prejudicial error. See *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-26, 115 P.3d 601, 607-08 (2005). A defendant bears the burden to demonstrate prejudice and may not rely on mere speculation to carry that burden. See *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006).

¶13 A flight or concealment instruction may be given if jurors could reasonably infer a consciousness of guilt from the defendant's manner in leaving the scene of a crime or from his destruction or concealment of evidence tending to prove the crime. See generally *State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992); *State v. Weible*, 142 Ariz. 113, 116, 688 P.2d 1005, 1008 (1984). The fact that a defendant may offer an explanation from which jurors could draw an inference inconsistent with a consciousness of guilt does not preclude the giving of a flight or concealment instruction because jurors are free to disbelieve the defendant's explanation. See *State v. Grijalva*, 137 Ariz. 10, 15,

667 P.2d 1336, 1341 (App. 1983), *superseded by statute on other grounds as stated in State v. Cons*, 208 Ariz. 409, 413, ¶ 9, 94 P.3d 609, 613 (App. 2004); *State v. Earby*, 136 Ariz. 246, 248-49, 665 P.2d 590, 592-93 (App. 1983).

¶14 After reviewing the record, we conclude that the trial court's flight or concealment instruction did not constitute error, much less fundamental, prejudicial error. Although the State concedes, and we agree, that the evidence presented at trial did not suggest that Appellant attempted to flee, the evidence nonetheless supports the reasonable inference that Appellant concealed evidence, demonstrating his consciousness of guilt. Specifically, Appellant concealed the laptop computer in his zipped-up backpack, which he placed in the teachers' lounge. Additionally, the teacher had observed something stuffed in Appellant's pants pockets when she was looking for the laptop, and the principal later found the stolen computer cords hidden near where Appellant had been seated while waiting for the police to arrive. Further, Appellant did not tell anyone about the laptop computer he had purportedly purchased, despite the fact that the computer was clearly marked as being property of the school, and he initially denied having the laptop when confronted about it. The court was not precluded from giving the flight or concealment instruction simply because Appellant offered an explanation different from the State's for the laptop computer being found in his backpack, or because he claimed at trial that he had given the

computer's cords to the police. The flight or concealment instruction permitted the jury to consider "the defendant's reasons for . . . concealing evidence," and it was within the jury's province to determine the inference to draw. See generally *Grijalva*, 137 Ariz. at 15, 667 P.2d at 1341; *Earby*, 136 Ariz. at 248-49, 665 P.2d at 592-93. Because the evidence could support the inference that Appellant concealed evidence by placing the stolen laptop computer in his backpack and by hiding the computer's cords in the area where he waited for the police, the trial court did not err in giving the State's requested flight or concealment instruction.⁵

CONCLUSION

¶15 Appellant's convictions and sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge

⁵ Moreover, even if we were to assume *arguendo* that error occurred, Appellant has not shown that such error would be fundamental or prejudicial, especially given the discretionary and cautionary language of the court's instruction. See, e.g., *Henderson*, 210 Ariz. at 567-68, ¶¶ 19-26, 115 P.3d at 607-08.