DIVISION ONE
FILED: 02/22/11
RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 10-0164
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
JAVON HUNTER SHELTON, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-155279-001 SE

The Honorable Connie Contes, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Javon Hunter Shelton appeals his conviction for attempted second-degree murder. He argues the superior court

erred by giving the jury an instruction on "flight or concealment." For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Following a series of verbal confrontations at a pick-up basketball game at a park, Shelton shot one of the players in the chest.[1] Shelton then ran to his truck and drove away at approximately 40 miles per hour.

¶3 At trial, the court gave the following instruction over Shelton's objection:

> 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, 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.

¶4 The jury convicted Shelton of attempted second-degree murder, a Class 2 dangerous felony. After the jury found four aggravating circumstances, the court sentenced Shelton to an aggravated term of 20 years.

¶5 Shelton timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution

[1] On appeal, "[w]e view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser,* 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

and Arizona Revised Statutes sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A) (2010).

DISCUSSION

¶6 Shelton argues the superior court erred in giving the jury the flight or concealment instruction recited above. We review the superior court's decision to give a particular jury instruction for an abuse of discretion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003). "A party is entitled to a jury instruction on any theory reasonably supported by the evidence." *State v. Tschilar*, 200 Ariz. 427, 436, ¶ 36, 27 P.3d 331, 340 (App. 2001).

¶7 A superior court may instruct the jury on flight only if it is "able to reasonably infer from the evidence that the defendant left the scene in a manner which obviously invites suspicion or announces guilt." *State v. Speers,* 209 Ariz. 125, 132, ¶ 28, 98 P.3d 560, 567 (App. 2004) (quoting *State v. Weible*, 142 Ariz. 113, 116, 688 P.2d 1005, 1008 (1984)). "Thus, merely leaving the scene or engaging in travel is not sufficient to support the giving of a flight instruction." *Speers*, 209 Ariz. at 132, ¶ 28, 98 P.3d at 567.

¶8 Shelton argues the court failed to examine whether the evidence "manifested a consciousness of guilt or obviously invited suspicion" and applied an improper presumption that

"whenever there is testimony [of] a defendant . . . running, the government is entitled to a flight instruction."

¶9 The evidence presented at trial showed that after Shelton shot the victim, he ran back to his truck, then drove away at approximately 40 miles per hour. Shelton told the jury that after the incident he "ran towards [his] vehicle." In context, evidence that Shelton ran from the scene invites suspicion and indicates a consciousness of guilt. *See State v. Lujan*, 124 Ariz. 365, 371, 604 P.2d 629, 635 (1979) ("Running from the scene of a crime, rather than walking away, may provide evidence of a guilty conscience prerequisite to a flight instruction.").

¶10 Shelton relies on *Speers,* but the equivocal evidence in that case*,* the defendant's possession of a passport and flight itinerary, is unlike the evidence here. 209 Ariz. at 133, ¶ 31, 98 P.3d at 568. The court in *Speers* observed there was no evidence that the defendant in that case bought a plane ticket or even made reservations for a trip: "Although Defendant may have thought about flight, his actions did not make him harder to find or camouflage his activities." *Id.*

¶11 Likewise, Shelton's reliance on *State v. Rodgers*, 103 Ariz. 393, 442 P.2d 840 (1968), is misguided. The Arizona Supreme Court held it was error to give a flight instruction in that case because there was no evidence that the defendant fled

the scene "under a consciousness of guilt and for the purpose of evading arrest." *Id.* at 395, 442 P.2d at 842. Merely leaving the scene is not sufficient to support a flight instruction; the defendant must leave in a way that invites suspicion. *See id.*

¶12 In contrast, Shelton concedes he ran to his vehicle after the shooting, but argues he ran because others were shooting at him. The jury was free to disbelieve Shelton and infer that his actions demonstrated consciousness of guilt. *See State v. Earby*, 136 Ariz. 246, 248, 665 P.2d 590, 592 (App. 1983). If the jury indeed disbelieved Shelton's explanation for why he hurried away, it could conclude his actions "manifest[ed] a consciousness of guilt." *Speers*, 209 Ariz. at 132, ¶ 27, 98 P.3d at 567; *see State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992) (running from scene and discarding shoes); *Lujan*, 124 Ariz. at 371, 604 P.2d at 635 (running from scene).

¶13 Shelton argues that *Earby*, *Salazar* and *Weible* all require the superior court to "engage in further analysis . . . when the accused runs from the scene [of a crime]." In each of the cited cases, the defendant ran from the scene and attempted by some additional act to conceal the crime. But the cases do not impose the rule that rushing from the scene, by itself, may not invite suspicion or announce guilt. *See Lujan*, 124 Ariz. at 371, 604 P.2d at 635.

¶14 Finally, even assuming *arguendo* that the superior court erred in giving the flight instruction, the error was harmless because of the overwhelming evidence against Shelton. *See Speers,* 209 Ariz. at 135, ¶ 37, 98 P.3d at 570. For an error in the superior court to be harmless, the error must not contribute to or affect the verdict. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005). Six witnesses testified they saw Shelton shoot the victim. Three witnesses refuted Shelton's testimony that he shot the victim in self-defense after being ambushed in a drug deal. Further undercutting Shelton's assertion that he acted in self-defense after being fired upon was evidence that only one shell casing was found at the scene of the crime.

CONCLUSION

¶15 For the reasons stated above, we affirm Shelton's conviction and resulting sentence.

/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/_____
DONN KESSLER, Presiding Judge

/s_____
SHELDON H. WEISBERG, Judge