IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LAZARO GONZALEZ CEPERO,
Appellant.

No. 2 CA-CR 2016-0172
Filed March 29, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20151632001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Michael Valenzuela, Assistant Attorney General, Phoenix
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

M I L L E R, Judge:

¶1 In this appeal from his convictions for robbery and aggravated robbery, appellant Lazaro Cepero contends the trial court abused its discretion in giving or failing to give certain jury instructions. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Cepero's convictions. *See State v. Delgado*, 232 Ariz. 182, ¶ 2, 303 P.3d 76, 79 (App. 2013). In April 2015, Cepero's co-defendant, Decora McElroy, attended a party at the home of the victim, who was also her ex-boyfriend. Because she was drinking heavily and her behavior eventually became disruptive, the victim asked her to leave the party. A few hours later, McElroy, now accompanied by Cepero, broke into the victim's home, held him at knife-point, and stole a television, credit card, a cellular telephone, and cash.

¶3 After the robbery, a law enforcement officer stopped Cepero and McElroy, who matched the victim's description of the robbers, walking nearby. Cepero was holding a "power cord," and during a subsequent search of the two, the officer found a remote control and a cell phone, which the victim identified as belonging to him. McElroy had a knife in her bra and the officer noticed "a bunch of . . . bank cards" near where she had been seated on the ground.

¶4 After a joint trial with McElroy, a jury found Cepero not guilty of armed robbery, aggravated assault, and kidnapping, but guilty of the lesser-included offense of robbery and of aggravated

robbery. The trial court sentenced Cepero to concurrent, presumptive terms of imprisonment, the longer of which was 7.5 years.

Jury Instructions

¶5 Cepero argues the trial court abused its discretion in giving various instructions to the jury that he contends were not supported by the evidence. "We review the court's decision to provide a particular jury instruction under an abuse of discretion standard." *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003).

¶6 Cepero first argues the trial court should not have instructed the jury that although flight or concealment "does not itself prove guilt," it could consider "any evidence of the defendants' running away, hiding, or concealing evidence, together with all the other evidence in the case." Cepero objected, noting that at most he had walked away. But based on Cepero and McElroy having left the scene and moving the television either to "the sidewalk or in[to] the desert," the court determined the instruction was appropriate.

¶7 "A flight instruction should only be given if the State presents evidence of flight after a crime from which jurors can infer a defendant's consciousness of guilt." S*tate v. Solis*, 236 Ariz. 285, ¶ 7, 339 P.3d 668, 669 (App. 2014). And, pursuant to the test set forth by our supreme court in *State v. Smith*, 113 Ariz. 298, 552 P.2d 1192 (1976), in the absence of open flight resulting from pursuit, "then the evidence must support the inference that the accused utilized the element of concealment or attempted concealment." *Solis*, 236 Ariz. 285, ¶ 7, 339 P.3d at 669, *quoting Smith*, 113 Ariz. at 300, 552 P.2d at 1194.

¶8 In this case, an instruction on concealment of evidence was appropriate because there was some evidence that the defendants had concealed evidence of the crime. McElroy told officers she had hidden the television set and Cepero initially held the power cord behind his back when stopped by an officer. The record before us, however, does not indicate Cepero and McElroy fled from the scene in a manner suggesting consciousness of guilt or evasion to

avoid pursuit. And, "[m]erely leaving the scene of a crime is not evidence of flight." *State v. Celaya*, 135 Ariz. 248, 256, 660 P.2d 849, 857 (1983). Moreover, the state's reliance on *State v. Cutright* is unavailing because we reach the same conclusion as in that case: merely leaving the residence, without more, is insufficient. 196 Ariz. 567, ¶ 13, 2 P.3d 657, 660 (App. 1999), *disapproved on other grounds by State v. Miranda*, 200 Ariz. 67, ¶ 5, 22 P.3d 506, 507-08 (2001). We therefore agree with Cepero that the trial court should have removed the reference to flight. *See, e.g.*, *United States v. Brown*, 575 F.2d 746, 747 (9th Cir. 1978) (per curiam) (instruction should be edited to remove surplusage).

¶9 We review such an error, however, under the harmless error standard, *see Solis*, 236 Ariz. 285, ¶ 12, 339 P.3d at 670, and we agree with the state that the error was harmless. In making that determination, "we must review the evidence and be convinced 'beyond a reasonable doubt that the error did not contribute to or affect the verdict.'" *Id.* ¶ 13, *quoting State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009). In considering whether an instruction is harmless error, we are also to "consider the attorneys' statements to the jury," *id.* ¶ 14, and the jury instructions as a whole, *see State ex rel. Thomas v. Granville*, 211 Ariz. 468, ¶ 8, 123 P.3d 662, 665 (2005).

¶10 The prosecutor in this case did not emphasize flight, only initially mentioning, "While fleeing and leaving, [the defendants] get stopped by law enforcement because [the victim] called 911." He did not suggest this supported an inference of guilt and did not mention flight again.

¶11 Furthermore, when it instructed the jury, the trial court gave not only the flight instruction, but an instruction that after the jury had "determined the facts," it might "find that some instructions no longer apply," and it should then "consider the instructions that do apply together with the facts as you have determined them" in order to decide the case. *See id.* ¶ 8 ("In our review, we read the jury instructions as a whole to ensure that the jury receives the information it needs to arrive at a legally correct decision."). In view of the evidence of Cepero's guilt, including his possession of the victim's property, the prosecutor's lack of reliance on the instruction, and the

totality of the instructions given to the jury, we determine the error was harmless.

¶12 Cepero further contends the trial court abused its discretion by providing "a voluntary intoxication instruction" to the jury. The court instructed that temporary, voluntary intoxication was "not a defense for any criminal act or requisite state of mind." Cepero objected, noting that when he had questioned the officer at trial the officer had not recalled whether McElroy had been intoxicated and had not indicated intoxication on his report. The victim, however, testified McElroy had been "drinking" and "tipsy" when he asked her to leave his home a few hours before she returned with Cepero. And he agreed that when McElroy drank she "got out of control." *Cf. State v. Nottingham*, 231 Ariz. 21, ¶ 14, 289 P.3d 949, 954 (App. 2012) ("If there is evidence tending to establish the underlying theory of the instruction, the instruction must be given and any conflict between that and other evidence must be resolved by the jury."), *quoting Starr v. Campos*, 134 Ariz. 254, 255, 655 P.2d 794, 795 (App. 1982). Cepero has cited no authority to suggest that a trial court may not properly instruct the jury as to voluntary intoxication in a joint trial when evidence of intoxication by one codefendant is present.

¶13 Cepero also asserts the trial court should not have instructed the jury as to expert testimony. On the first day of trial, the parties informed the court that the state would not "be calling the fingerprint expert," but would instead allow the "case detective" to testify about fingerprints. They explained they were "stipulating to the foundation of the fingerprints, and it's going to be that Defendant McElroy's palm print was located on the [television,] and Defendant Cepero's fingerprints were not found on the [television]."

¶14 Later, when proposed instructions were discussed, the prosecutor stated, "We don't need the expert one." The court asked about the fingerprint evidence, and defense counsel, instead of making a specific objection, stated, "That's a stipulation. It's not an opinion." The court pointed out the jury was not required to accept any stipulation, and McElroy's counsel stated that the stipulation had only been "not to object on hearsay grounds." No further objection was made and the court ultimately gave the instruction, telling the

jury that although the opinion of a witness is not ordinarily allowed as evidence, "a witness may testify as to an opinion on a subject upon which the witness has become an expert."

¶15 The state contends Cepero forfeited this claim for all but fundamental error by failing to object adequately. Cepero replies that "[n]o magic words are required" to properly object, "as long as the objection is made in a manner that permits the court and the parties to understand each other['s] meaning." But Rule 21.3(c), Ariz. R. Crim. P. requires that in objecting to an instruction, a party must "stat[e] distinctly the matter to which the party objects and the grounds of his or her objection." On the record before us, that standard was not met. It is unclear whether Cepero was agreeing or disagreeing with the need for the instruction based on the limited comments made by counsel about the stipulation. In the absence of a clear objection, we review only for fundamental error. *See State v. Payne*, 233 Ariz. 484, ¶ 137, 314 P.3d 1239, 1271 (2013).

¶16 Cepero argues the expert-opinion instruction "bolster[ed] the officers' testimony," giving them "the mantle of 'expert.'" But we cannot say this was sufficient to prejudice him. With respect to Cepero, the officers did not testify based on their "training and experience" or give other testimony that might be given additional credibility if deemed "expert." Rather, the officers' testimony was largely undisputed—providing descriptions of statements made by the defendants and what was found in their possession upon their arrest. The only "expert" testimony received was the fingerprint evidence, and that testimony did not inculpate Cepero. As a whole, Cepero's defense focused mainly on the victim's credibility, not that of the officers. We therefore cannot say Cepero has carried his burden to establish prejudice arising from the instruction. *See State v. Munninger*, 213 Ariz. 393, ¶ 14, 142 P.3d 701, 705 (App. 2006).

¶17 Cepero finally maintains the trial court should have instructed the jury "to consider each element of each charge against the defendants separately and to consider only the evidence against each defendant separately." He claims the court's failure to do so sua sponte constituted fundamental error. In support, Cepero relies

primarily on this court's decision in *State v. Vasquez*, 233 Ariz. 302, 311 P.3d 1115 (App. 2013). But that case addressed the propriety of a motion to sever and whether instructing the jury to separately consider the charges against each defendant could cure the trial court's error in denying the motion. *Id.* ¶¶ 16-19. And, in his reply brief, Cepero withdrew the argument that his motion to sever was improperly denied, thereby acknowledging that no such issue is presented in this case.

¶18 Cepero cites no authority to support his contention that the trial court insufficiently instructed the jurors by explaining, "Each count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it uninfluenced by your decision as to any other count." Rather, he apparently claims that the cumulative effect of the court's error in the flight instruction and other purported errors were sufficient to establish prejudice. "Arizona rejects the 'cumulative error doctrine' outside the context of prosecutorial misconduct claims." *State v. Romero*, 240 Ariz. 503, ¶ 16, 381 P.3d 297, 304 (App. 2016). And Cepero has not otherwise established error or resulting prejudice in regard to this instruction.

Disposition

¶19 We affirm Cepero's convictions and sentences.