

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JEROME LEDARRYL BIRDOW,
Appellant.

No. 2 CA-CR 2016-0288
Filed July 21, 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NOT FOR PUBLICATION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. CR20104165001
The Honorable Paul E. Tang, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Alex Heveri, Assistant Legal Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Staring and Judge Kelly¹ concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Jerome Birdow was convicted of five counts of sale of a narcotic drug and sentenced to concurrent prison terms of 9.25 years for each offense. On appeal, he argues the trial court erred by failing to properly “inquire into the basis” of his letter expressing dissatisfaction with counsel and by giving a flight instruction to the jury. We affirm.

¶2 We view the facts in the light most favorable to upholding the jury’s verdicts. *State v. Smith*, 242 Ariz. 98, ¶ 2, 393 P.3d 159, 161 (App. 2017). On five occasions in 2010, Birdow participated in the sale of crack cocaine to an undercover police officer. When officers attempted to detain him after the fifth sale, he drove over a curb in his vehicle and accelerated away at a speed exceeding the legal limit before abandoning the vehicle in an alley.

¶3 Before Birdow’s first trial, which ultimately ended in a mistrial, he sent a letter to the trial court requesting, inter alia, that he be appointed new counsel. He asserted current counsel had not adequately prepared for trial because he believed Birdow eventually would receive a more generous plea offer. The minute entry for the first day of trial reflects that the court noted it had received the letter, Birdow’s counsel advised the court Birdow was withdrawing his claims and “is prepared to proceed with trial,” and the court questioned Birdow and concluded “he is comfortable in proceeding with trial this date.” The court declared a mistrial the following day

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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after two jurors were excused and the jury panel was reduced below twelve members. After a second trial, Birdow was convicted and sentenced as described above. This appeal followed.

¶4 Birdow first argues the trial court erred because it did not inquire into the reasons for his letter complaining about counsel's preparation and requesting new counsel. "We review a trial court's denial of a request for new counsel for abuse of discretion." *State v. Goudeau*, 239 Ariz. 421, ¶ 68, 372 P.3d 945, 970 (2016). "A trial court abuses its discretion by summarily denying a motion for change of counsel without inquiring into the 'specific factual allegations that raised a colorable claim that [the defendant] had an irreconcilable conflict with his appointed counsel.'" *Id.*, quoting *State v. Torres*, 208 Ariz. 340, ¶ 9, 93 P.3d 1056, 1059 (2004) (alteration in *Goudeau*).

¶5 However, Birdow has not provided this court with a transcript of the trial court's discussion of this issue with him on the first day of his first trial. His claim that the court failed to conduct a sufficient inquiry is thus entirely unsupported. "It is the duty of counsel who raise objections on appeal to see that the record . . . contains the material to which they take exception." *State v. Geeslin*, 223 Ariz. 553, ¶ 5, 225 P.2d 1129, 1130 (2010), quoting *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982) (alteration in *Geeslin*). "When 'matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court.'" *Id.*, quoting *Zuck*, 134 Ariz. at 513, 658 P.2d at 166. Accordingly, we do not address this argument further.²

¶6 Birdow next claims the trial court erred by giving a flight instruction to the jury. Over Birdow's objection, the court instructed the jury it could, in evaluating Birdow's guilt, "consider any evidence of the defendant's running away, hiding, or concealing evidence together with all the other evidence in the case. Running away,

² Nor need we address the state's argument that, by withdrawing his request, Birdow has forfeited all but fundamental error.

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hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.”

¶7 We review for an abuse of discretion a trial court’s decision to provide a particular instruction. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003). “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.” *State v. Solis*, 236 Ariz. 285, ¶ 7, 339 P.3d 668, 669 (App. 2014). A flight instruction is warranted if the evidence “supports a reasonable inference that the flight or attempted flight was open, such as the result of an immediate pursuit.” *State v. Smith*, 113 Ariz. 298, 300, 552 P.2d 1192, 1194 (1976). If there is no evidence of open flight, an instruction is nonetheless permitted if the evidence supports “the inference that the accused utilized the element of concealment or attempted concealment.” *Id.*

¶8 As he did below, Birdow argues insufficient evidence supports the flight instruction. He asserts there was no evidence he “fled the scene because he was never found near the car.” But Birdow has not identified any reason he would have to have been found nearby for a flight instruction to be appropriate. The evidence supports the conclusion Birdow drove the vehicle away from officers attempting to stop it and abandoned the car in the alley. This evidence of open flight amply supports the trial court’s decision to give the instruction. *See id.*

¶9 We affirm Birdow’s convictions and sentences.