

ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR10-113

ROBERT EUGENE JOHNSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered October 6, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION [CR-2008-3078]

HONORABLE WILLARD
PROCTOR, JR., JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Appellant Robert Johnson was tried by a jury and found guilty of the offenses of possession of cocaine with intent to deliver and resisting arrest. He was sentenced as an habitual offender to forty years in the Arkansas Department of Correction on the possession conviction. He was sentenced to one year in the county jail on the resisting arrest conviction, which will be satisfied by his forty-year imprisonment. As his sole point of appeal, he contends that the trial court abused its discretion in allowing a State-offered instruction, concerning flight as evidence of guilt, to be given to the jury. We do not address the merits of appellant's argument because it was not preserved for our review.

Background

The instruction given by the trial court and challenged by appellant in this appeal is:

EVIDENCE OF FLIGHT AS CORROBORATION OF GUILT

Evidence that the defendant fled to avoid arrest or detection by the police may be considered by you in your deliberations as a circumstance in corroboration of evidence tending to establish the guilt of the defendant.

There was limited discussion about the challenged instruction at trial:

THE COURT: This is the non-AMCI. Okay, that flight is evidence of guilt.

DEFENSE COUNSEL: *And, Your Honor, that's the one that we're objecting to. We just find that it's prejudicial, and, of course, they have to put their case on.*

THE COURT: Okay. Right. I'll give this over objection. So that non-AMCI will be given of flight. I thought that was an AMCI, but I guess there's not.

DEPUTY PROSECUTING ATTORNEY: I don't believe there is.

THE COURT: Okay. But, yeah, that is a correct statement of law that flight is some evidence of guilt.

(Emphasis added.)

Thus, at trial, the extent of appellant's argument in objection to this instruction was that "it's prejudicial." He also contemplated that "they have to put their case on," *i.e.*, that the proof might not support the instruction; however, no further objection was ever made.

The argument on appeal is that the non-AMI instruction "emphasized a specific fact that the State relied on to prove appellant Johnson's guilt"¹ That argument is entirely different

¹As noted in the State's brief, "Appellant does not allege that the trial court erred by giving the flight instruction because it was a non-model instruction, it ran afoul of the model instructions themselves, it did not accurately state the law, or there was not a rational basis in the evidence for giving it."

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from the one presented at trial. Consequently, it was not preserved for this court's review, and we do not address the merits of the argument. *Evans v. State*, 326 Ark. 279, 931 S.W.2d 136 (1996).

Affirmed.

GLADWIN and ABRAMSON, JJ., agree.