

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

FILED BY CLERK

JUN 10 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0271
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ROBERT DARRIN SLOCUM JR.,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103270001

Honorable Deborah Bernini, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and David A. Sullivan

Tucson
Attorneys for Appellee

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K E L L Y, Judge.

¶1 Following a jury trial, appellant Robert Slocum Jr. was convicted of aggravated driving while under the influence of an intoxicant (DUI) and aggravated driving with a blood alcohol concentration (BAC) of .08 or more, both based on his having driven while his license or privilege to drive in Arizona had been suspended, revoked or restricted. The trial court suspended the imposition of sentence and placed Slocum on three years' probation, ordering him to serve a four month jail term as a condition of his probation. On appeal, Slocum argues the court erred in denying his motion for judgment of acquittal, claiming there was insufficient evidence to show he drove or was in actual physical control of a vehicle, and erroneously gave the jury an instruction on flight. He asks that we vacate his convictions and sentences, or reverse his convictions and remand for a new trial. Finding no error, we affirm.

¶2 We review de novo the trial court's denial of a motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., viewing the evidence in the light most favorable to upholding the jury's verdicts, *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). On a Rule 20 motion, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Parker*, 231 Ariz. 391, ¶ 70, 296 P.3d 54, 70 (2013) (emphasis omitted), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). As long as there is substantial evidence in the record establishing the elements of the offense, a Rule 20 motion must be denied. See *id.* Substantial evidence is "such proof that reasonable persons could accept as adequate

and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.”
West, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, quoting *State v. Mathers*, 165 Ariz. 64, 67,
796 P.2d 866, 869 (1990).

¶3 On an evening in September 2010, Slocum went to a Tucson restaurant with some coworkers to watch a football game. Z., one of Slocum's coworkers, testified that when he left the restaurant with another coworker, C., he saw Slocum's vehicle crashed “off to the side of the road . . . [with] smoke rolling out.” Z. added that although he saw Slocum near the car after the accident, Slocum “left [minutes] before the cops got there.”

¶4 Upon learning that the disabled vehicle was registered to Slocum and that a dark-colored sport utility vehicle (SUV) had just left the scene of the accident, officers went to Slocum's home to await his return. Tucson Police Officer Michael Miller testified he had turned off his lights and parked his patrol vehicle across the street from Slocum's home when he “observed a dark-colored SUV . . . slow[] down in front of the listed address . . . [a]nd as soon as the car slowed down it took off at a high rate of speed.” Miller subsequently stopped the vehicle for a “traffic stop” and made contact with two individuals, a female driver and Slocum, who was the passenger.

¶5 Miller noted that Slocum “had some abrasions, scratches to his face that were consistent with an air bag deployment,” and that he had an odor of “intoxicants.” Miller placed Slocum in handcuffs, and after Slocum indicated he understood his rights under *Miranda*,¹ he told Miller his vehicle was near the restaurant where he had joined

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

some friends that evening. He first said “he [had] exited the restaurant and noticed that his vehicle was missing and located it crashed on the median there at Broadway and Harrison.” He then told Miller that, because his license had been suspended, he had been the passenger in his own vehicle, and that a friend/coworker named Matt had been driving when the accident had occurred. Tucson Police Officer Nathaniel Foster acknowledged at trial that he had been “advised” during the investigation that Slocum had “crashed his vehicle.” Z. testified that although he had not witnessed the accident, he did recall having told officers that he had seen Slocum exit from the driver’s side of the vehicle just after the accident. However, contrary to the officers’ testimony, Z. also testified he did not recall having told them Slocum had “crashed his car” or that he had been alone when Z. had discovered him. Notably, Z. testified he “[v]aguely” remembered the details of the accident and that his memory of the evening was “fairly hazy.” C. similarly testified she had told officers the disabled car belonged to Slocum, but did not recall having told them Slocum had been alone in the car when the accident had occurred or that she had seen him standing next to the driver’s door after the accident.

¶6 Slocum testified he had permitted a coworker named Matt to drive his car on a regular basis, notwithstanding that he did not know Matt’s last name or where he lived, and added that because Matt was “an older individual,” Slocum thought “he ha[d] his stuff together.” He testified Matt had picked him up at the restaurant, and “I had looked over, because I was in the passenger seat . . . and we were already on top of the curb. That’s when the air bag deployed. My eyes were open. And I was like riding the

top of the curb.” Slocum added that he exited from the driver’s door because the passenger door would not open, and Matt “bolted” with another friend because Slocum was so angry about the accident. Slocum explained that he then left the scene because he was unable to do anything about his car that night and there was no reason to remain. He further testified, “We had actually made it home. And then there was an officer sitting outside of my house, so I didn’t stop . . . I was like let’s go to my parent’s house and go get the trailer [to transport the car].”

¶7 Slocum admitted he had lied to police, giving them different versions of what had occurred to protect his friends, noting that “I care about my friends. So I just didn’t want to give the officer something . . . that they can go arrest one of my friends.” Slocum refused to perform field sobriety tests, but later submitted to breathalyzer tests, which measured his BAC at .113 and .107 respectively. Finally, Slocum testified that although he had consumed alcohol and he knew that his license was suspended, he did not drive that evening. He also testified that Matt had returned his car keys the week after the accident, and then had “disappeared.”

¶8 Tucson Police Officer William Honomichl testified that when he arrived at the scene of the accident, both Z. and C. told him they had seen Slocum “leave [the restaurant] by himself in his vehicle and that nobody was with him,” and that although they had not witnessed the actual accident, they had seen Slocum “exiting the driver’s door of his own vehicle when they were driving up to the scene.” Honomichl testified that when he questioned Slocum, who police brought back to the scene of the accident,

Slocum had told him, “I had a long night at the bar. I hit the curb. And now I’m here. I’ll do whatever.” Honomichl further testified that when he had first questioned Slocum “in the back of the patrol car [Slocum] had made a statement that he . . . was driving [and] that he had hit the curb,” but that he later said he had not been driving. When Slocum was asked at trial about having told the police he had hit the curb, he explained he had meant he “was the one that was on the passenger side that actually physically hit the curb,” and not that he was the driver. Honomichl also testified that during his investigation Slocum never told him Matt was the driver, that “both the driver’s and the passenger air bags were deployed because of impact,” and that Slocum had exhibited numerous signs of intoxication.

¶9 After the state had presented all of its evidence, Slocum moved for a judgment of acquittal on both counts, arguing the state had failed to present sufficient evidence he was the driver. The trial court denied the motion, finding that although there was no direct evidence Slocum was the driver, there was circumstantial evidence of that fact. *See State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981) (evidence required to sustain conviction “may be either circumstantial or direct,” and “[t]he probative value of evidence is not reduced simply because it is circumstantial.”).

¶10 Slocum does not dispute that his BAC was over the legal limit or that his license was suspended when the accident occurred. Rather, he argues the trial court erred in denying his motion for a judgment of acquittal because the evidence was insufficient to show he was driving or in actual physical control of the vehicle, an essential element of

DUI. *See* A.R.S. § 28-1381(A). He asserts that, because no witnesses saw him driving, and because “the keys to the car were not located that evening,” the Rule 20 motion should have been granted, adding that “[t]he only testimony of any weight was the sworn testimony of the two witnesses [Z. and C.] that they did not see Slocum driving and did not know who was driving.”

¶11 There was substantial evidence presented at trial from which reasonable jurors could have found Slocum had driven his car on the night in question. *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. The evidence established that Slocum had given officers a variety of explanations for the accident, including that someone had stolen his car, he had “hit the curb,” and Matt, whose last name and address he did not know, and who had disappeared shortly after the accident, had been driving his car. Moreover, the jury also was presented with evidence that Slocum had left the restaurant by himself, had exited the driver’s side of his car immediately after the accident, had left the scene of the accident, and had passed his own home at a “high rate of speed” in the presence of a marked police car.

¶12 In essence, Slocum asks us to reweigh the evidence and find that the balance weighs in his favor. But “[w]hen the evidence supporting a verdict is challenged on appeal, an appellate court will not reweigh the evidence.” *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). “The credibility of witnesses is an issue of fact to be resolved by the jury; as long as there is substantial supporting evidence, we will not disturb their determination.” *State v. Harrison*, 111 Ariz. 508, 509, 533 P.2d 1143, 1144

(1975). And, although the jury was entitled to take into consideration Slocum's explanation of events, *see State v. Love*, 182 Ariz. 324, 326, 897 P.2d 626, 628 (1995), it was not required to accept his account and could properly reject it as incredible, particularly in light of Slocum's admission at trial that he had lied to the police. In addition, Z. admitted that his recollection, which Slocum characterizes as some of "[t]he only testimony of any weight," was "hazy" and vague.

¶13 Slocum also argues "the only evidence that [he] drove that night [was] the statements of the police officer that were admitted as prior inconsistent statements [under Rule 801(d)(1)(A), Ariz. R. Evid.] by C. and Z.," statements Slocum asserts should have been excluded as unduly prejudicial under Rule 403, Ariz. R. Evid. However, Slocum did not object to the officers' testimony on this ground at trial. Accordingly, Slocum has forfeited the right to seek relief on this ground absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006) ("A defendant generally waives his objection to testimony if he fails either to ask that it be stricken, with limiting instructions given, or to request a mistrial."). Additionally, Slocum has waived our review of his claim for fundamental error by failing to assert or argue on appeal that the alleged error was fundamental and prejudicial, nor have we found any error that can be so characterized. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (concluding argument waived because defendant "d[id] not argue the alleged error was fundamental"); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650

(App. 2007) (court will not ignore fundamental error if it sees it). Therefore, based on the evidence the state presented, the trial court did not err in denying Slocum's motion for a judgment of acquittal.

¶14 Slocum also argues the trial court erred by giving the following jury instruction over his objection:

Flight of the accused after a crime has been committed does not create a presumption of guilt. It is, however, a circumstance which may tend to prove consciousness of guilt.

If you find that the defendant voluntarily withdrew from the scene of the accident in order to avoid arrest, detention or institution of criminal proceedings you may consider that and weigh it in connection with all the other evidence.

¶15 Slocum asserts the trial court erred in giving the flight instruction because there was no evidence showing he had left the scene of the accident to evade arrest. "We review the trial court's decision to give . . . a jury instruction for an abuse of discretion," *State v. Hurley*, 197 Ariz. 400, ¶ 9, 4 P.3d 455, 457 (App. 2000), and review de novo "whether the jurors were properly instructed," *State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 617 (2009). A party is "entitled to an instruction on any theory reasonably supported by [the] evidence." *State v. Anderson*, 210 Ariz. 327, ¶ 60, 111 P.3d 369, 385 (2005), quoting *State v. LaGrand*, 152 Ariz. 483, 487, 733 P.2d 1066, 1070 (1987). A flight instruction is warranted when the evidence demonstrates either open flight, suggesting "consciousness of guilt," or concealment. *State v. Hunter*, 136 Ariz. 45, 48-49, 664 P.2d 195, 198-99 (1983).

¶16 Slocum suggests the flight instruction was not warranted because the evidence showed he had left the scene with a friend since he “had no way to get home,” and because he “undertook no special effort to conceal leaving the area or to avoid arrest.” *See State v. Wilson*, 185 Ariz. 254, 257, 914 P.2d 1346, 1349 (App. 1995) (instruction not warranted when evidence only showed defendant had driven home from scene). He maintains the fact that he did not stop at his own house when an officer was parked nearby “is not indicative of flight because he was not in control of the vehicle at the time.”

¶17 Slocum also contends that giving this instruction to the jury erroneously “indicated a spurious impression of consciousness of guilt” and was not harmless. “When an issue is raised and erroneously ruled on by the trial court, we are required to review for harmless error.” *State v. Speers*, 209 Ariz. 125, ¶ 32, 98 P.3d 560, 568 (App. 2004). “Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.” *Id.*, quoting *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1199 (1993).

¶18 Here, the evidence that Slocum “quickly” abandoned his car and left the scene of the accident, and then approached his own house slowly and “took off at a high rate of speed” in the presence of a patrol car invites suspicion of his guilt. *See State v. Lujan*, 124 Ariz. 365, 371, 604 P.2d 629, 635 (1979) (flight instruction warranted when defendant had run away from stabbing scene, even though not pursued by police); *State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992) (instruction appropriate when,

although not pursued, defendant had run from scene and discarded shoes). Based on this evidence, a reasonable jury could conclude that Slocum’s conduct demonstrated a consciousness of guilt.

¶19 Moreover, the jury was instructed that if it found Slocum “voluntarily withdrew from the scene . . . in order to avoid arrest,” it “may” consider this “in connection with all the other evidence” as evidence of flight. We presume the jury followed the trial court’s instruction. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006).

¶20 For all of the foregoing reasons, we affirm Slocum’s convictions and the term of probation imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge