DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. KELLY J. MOHR, Appellant.	)	1 CA-CR 11-0291 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-135089-001 DT

The Honorable Arthur T. Anderson, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Defendant Kelly J. Mohr has advised us that, after searching the entire record, he has been unable to discover any arguable questions of law. Defendant, however, has asked counsel to raise a number of specific issues on appeal. For the following reasons, we affirm.

FACTS[1]

¶2 Police responded to a convenience store parking lot early on July 6, 2010, after receiving a complaint that individuals were selling items out of their parked car. Defendant was sitting in the driver's seat and consented to the search of the car. The female, who was sitting in the passenger seat, produced a key to the trunk,[2] where the officers found computer parts and software, multiple identical purses, identical wallets, bags of jewelry, and a modified rifle. Defendant admitted to being a convicted felon, and was subsequently charged with being a prohibited possessor in possession of a prohibited weapon.

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[1] We review the facts in the light most favorable to sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

[2] There was no key in the ignition; Defendant explained that he had been manipulating exposed wires in order to operate the 1994 Honda.

¶3 Defendant was tried in absentia and found guilty of two counts of misconduct involving weapons. The jury also found that he had five felony convictions in addition to the conviction used to prove that he was a prohibited possessor. Defendant was subsequently sentenced to eleven years in prison for each count, to run concurrently, and received credit for 282 days of presentence incarceration.

¶4 We have jurisdiction over this appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A)(1) (West 2012).

DISCUSSION

¶5 Defendant raises the following issues on appeal: (1) the evidence was insufficient to sustain the convictions; (2) the court erred by determining that Defendant bore the burden to prove that his right to possess a firearm had been restored; (3) the court erred by refusing to recess the trial after Defendant was apprehended; (4) the court erred by overruling Defendant's objection to the State's rebuttal closing argument; and (5) prosecutorial misconduct.[3] We will address each in turn.

[3] Defendant has also asked his appellate counsel to raise ineffective assistance of counsel on his behalf. Such claims, however, "are to be brought in Rule 32 [post-conviction relief] proceedings." *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Accordingly, we will not address the argument in this direct appeal. *See id.*

Sufficiency of the Evidence

¶6 At the close of the State's case, Defendant unsuccessfully moved for a judgment of acquittal pursuant to Arizona Rule of Criminal Procedure ("Rule") 20. We review the denial of a Rule 20 motion de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted). The motion must be denied if reasonable jurors can draw divergent inferences from the evidence. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). Thus, we will affirm the ruling unless "no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005). Substantial evidence consists of circumstantial or direct "proof that reasonable persons could accept as adequate and sufficient to support a conclusion of [the] defendant's guilt beyond a reasonable doubt." *Id.* (citation and internal quotation marks omitted).

¶7 Section 13-3102(A)(3) (West 2012)[4] states that it is unlawful to possess "[a] rifle with a barrel length of less than sixteen inches . . . or any firearm that is made from a rifle or shotgun and that, as modified, has an overall length of less than twenty-six inches." A.R.S. § 13-3101(A)(8)(iv) (West 2012) (defining "prohibited weapon"). The State therefore had to

[4] We cite the current version of an applicable statute if no revisions material to this decision have occurred since the offense.

prove that Defendant knowingly possessed a weapon that satisfied at least one of the definitions. A.R.S. § 13-3102(A)(3). In addition, because the rifle was discovered in the trunk of the car, the State had to show that it was "found in a place under the defendant's dominion or control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the [rifle]." *State v. Cox*, 214 Ariz. 518, 520, ¶ 10, 155 P.3d 357, 359 (App. 2007) (citation and internal quotation marks omitted), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007); *see also* A.R.S. § 13-105(34) (West 2012) (defining constructive possession as "dominion or control" over an item); *State v. Carroll*, 111 Ariz. 216, 218, 526 P.2d 1238, 1240 (1974) (citation omitted) (constructive possession is not exclusive and may be shared). Whether Defendant knew that the gun was illegal because of its modifications, however, is irrelevant. *State v. Young*, 192 Ariz. 303, 311-12, ¶ 32, 965 P.2d 37, 45-46 (App. 1998) (knowledge that gun's specific length violates the law is not an element of the offense).

¶8 At trial, the rifle was admitted as an exhibit, and the officer who measured the rifle testified that the handle had been sawn off and that the twenty-one-inch gun had a ten-inch barrel. Consequently, there was sufficient evidence to demonstrate that the confiscated rifle was a prohibited weapon.

¶9 The State also presented evidence that Defendant knowingly possessed the rifle. The arresting officers testified that Defendant owned the car and was the driver; that he admitted to selling items at the parking lot before they arrived; and that all of the merchandise was located in the trunk. As a result, there was evidence from which reasonable jurors could conclude that Defendant knew about and had access to the rifle in the trunk of his car.[5] Consequently, there was sufficient evidence to allow the case to go to the jury so that it could determine whether the State had proven its case beyond a reasonable doubt.

¶10 There was also sufficient evidence to allow reasonable jurors to conclude that Defendant was a prohibited possessor. *See* A.R.S. § 13-3102(A)(4) (West 2012). The State presented certified criminal history records and the testimony of the Arizona Department of Correction's records custodian[6] to show that he was a convicted felon who was prohibited from possessing

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[5] Both knowledge and possession may be established by circumstantial evidence, *State v. Hull*, 15 Ariz. App. 134, 135, 486 P.2d 814, 815 (1971) (citation omitted), which is the proof of a fact from which the existence of another fact may be inferred. *See id.*; *see also State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993) ("Arizona law makes no distinction between circumstantial and direct evidence.") (citation omitted).

[6] The court granted Defendant's motion to sanitize the 1989 felony conviction. The court also precluded evidence of Defendant's other felony convictions and evidence demonstrating that he was ineligible even to apply for restoration at the time of the arrest.

any firearm. *See* A.R.S. § 13-3101(A)(7)(b) (West 2012). And, the arresting officers testified that Defendant admitted he was a convicted felon after they found the rifle. Consequently, the evidence supports the denial of the Rule 20 motion and the jury's verdict. Accordingly, we find no error.

Restoration of the Right to Possess a Firearm

¶11 Defendant next argues that the court erred when it determined that the State was not required to prove that his right to possess a firearm had not been restored. We review the ruling de novo because it involves statutory interpretation. *State v. Kelly*, 210 Ariz. 460, 461, ¶ 3, 112 P.3d 682, 683 (App. 2005) (citation omitted).

¶12 Despite Defendant's argument, in *Kelly* we held that restoration of the right is not an element of the offense, but an exception or an affirmative defense. *Id.* at 463, ¶ 11, 112 P.3d at 685. Accordingly, "a defendant [who is a prohibited possessor] bears the burden of proving his or her right to possess a firearm has been restored." *Id.* at 462, ¶ 6, 112 P.3d at 684. As a result, the court did not err.

Right to be Present at Trial

¶13 At the final pretrial conference, Defendant was advised that if he did not appear for jury selection the following day, a warrant would be issued for his arrest and he could be tried in absentia. Defendant did not appear, a warrant

was issued, and the trial proceeded in his absence. Defendant was apprehended before the trial concluded. He unsuccessfully asked the court to continue the trial to allow him to be present.

¶14 Defendant argues that the court erred when it denied his request. We review the court's ruling for an abuse of discretion. *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996).

¶15 The right to attend and to be present at trial is not absolute, and may be waived. *See State v. Levato*, 186 Ariz. 441, 443-44, 924 P.2d 445, 447-48 (1996) (citations omitted) (right to be present protected under U.S. Const. amends. V, VI, XIV; Ariz. Const. art. II, § 24; and Ariz. R. Crim. P. Rule 19.2). In fact, Rule 9.1 allows a court to infer that "a defendant [has] waive[d] the right to be present" at trial if the defendant's absence is voluntary.

¶16 Here, Defendant "had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear." *Id.* Moreover, there was no information that Defendant's absence was involuntary – that he did not attend the trial because he had been hospitalized or arrested. *See State v. Bohn*, 116 Ariz. 500, 503, 570 P.2d 187, 190 (1977) (citations omitted) (pursuant to Rule 9.1, "court may

presume a defendant's absence is voluntary, and the burden is on the defendant to demonstrate otherwise"); *State v. Fristoe*, 135 Ariz. 25, 34, 658 P.2d 825, 834 (App. 1982) (due process does not require court to hold voluntariness of absence hearing unless defendant rebuts Rule 9.1 inference). Consequently, the court did not abuse its discretion by determining that Defendant had voluntarily absented himself from trial.

¶17 On the last day of trial, the defense advised the court off the record that Defendant had been apprehended and was in the county jail's intake system. Later that morning — after the State and defense rested, the final instructions were read, and the jury was released for lunch — the court addressed Defendant's earlier request to be present for trial. The court confirmed that Defendant had been apprehended the previous night after a barricade situation. The court also learned that he was hospitalized after being shot with a bean-bag pellet, that he was being processed in the jail's intake system, and that it would be twelve to sixteen hours before he could speak with his lawyer. As a result, the court determined that Defendant was not present and had not voluntarily returned to participate in the proceedings. Moreover, given the fact that the trial had been completed during his voluntary absence, the court did not abuse its discretion by denying the request for a mistrial or continuance.

Shifting Burden of Proof

¶18 Defendant argues that the court should have sustained his objection when the prosecutor improperly shifted the burden of proof to Defendant during his rebuttal closing argument. He complains that, in response to the defense argument that the evidence showed he did not know the weapon was in the trunk, the prosecutor argued that the jury "ha[d] no evidence" that Defendant was unaware of the weapon.[7] We review the court's ruling for an abuse of discretion. *See Landrigan*, 176 Ariz. at 4, 859 P.2d at 114 (citation omitted).

¶19 In overruling Defendant's objection, the court observed that the prosecutor was merely "pointing out that some of the [defense counsel's] argument . . . was not reflected in any evidence that was presented in the record." And, as we have stated:

> When a prosecutor comments on a defendant's failure to present evidence to support his or her theory of the case, it is neither improper nor shifts the burden of proof to the defendant so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify.

State v. Sarullo, 219 Ariz. 431, 437, ¶ 24, 199 P.3d 686, 692 (App. 2008) (citation omitted). Here, the statements were intended to rebut the argument that the evidence showed

[7] Defense counsel had asserted throughout his closing argument that "[Defendant] did not know that gun was in the trunk of the car" and "[t]he evidence show[ed] he didn't."

Defendant did not know about the gun. As a result, the court did not err when it denied the objection to the rebuttal argument. *See id.*

Prosecutorial Misconduct

¶20 Defendant argues that the prosecutor committed reversible error when he commented on Defendant's right to remain silent. A criminal defendant "shall not be compelled to be a witness against himself . . . [and the] refusal to be a witness in his own behalf shall not in any manner prejudice him, or be used against him on the trial or proceedings." A.R.S. § 13-117(A)(B) (West 2012); *accord* Ariz. Const. art. II, § 10. We review whether the comments were likely to be perceived by the jury as a comment on Defendant's failure to testify. *See State v. Cook*, 170 Ariz. 40, 51, 821 P.2d 731, 742 (1991) (citations omitted). "[T]o be impermissible, the prosecutor's comments must be calculated to direct the jurors' attention to the defendant's exercise of his fifth amendment privilege." *Id.* (citation and internal quotation marks omitted). We will not reverse unless the prosecutor's statements were improper and "so infected the trial with unfairness as to make the resulting conviction[s] a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (citations omitted).

¶21 During the State's rebuttal argument, and to rebut the argument that there was evidence that Defendant lacked knowledge of the gun in the trunk, the prosecutor pointed out that "[t]here's not one witness that came up here and testified that the defendant didn't know that weapon was there." The rebuttal argument therefore noted that no witness had testified about Defendant's knowledge of the gun, but the general reference to witnesses did not direct attention to Defendant's decision not to testify. *See State v. Martinez*, 130 Ariz. 80, 81-83, 634 P.2d 7, 8-10 (App. 1981) (highlighting lack of evidence in support of defense's theory "that the prosecutor improperly commented on appellant's right not to testify" because statements were made in rebuttal to area opened by defense and did not draw jury's attention to defendant's failure to testify); *compare State v. Fuller*, 143 Ariz. 571, 574-75, 694 P.2d 1185, 1188-89 (1985) (statement that defense had "presented no evidence, nothing positive" did not violate Fifth Amendment, especially where defendant was not the only witness able to counter State's evidence) *with State v. Rhodes*, 110 Ariz. 237, 237-38, 517 P.2d 507, 507-08 (1973) (reversal warranted by statement that defendant "did not explain away off of that witness stand" a key fact litigated at trial). Accordingly, we find no error.

¶22 Finally, Defendant challenges statements made by the prosecutor during closing arguments which indicated "that defense counsel had engaged in improper conduct during his closing argument." Attorneys have considerable latitude in delivering closing arguments "to comment on the evidence already introduced and to argue reasonable inferences therefrom." *State v. Gonzales*, 105 Ariz. 434, 436-37, 466 P.2d 388, 390-91 (1970) (citations omitted). To determine if a statement was improper, we consider whether the remark highlighted a matter that the jury was not permitted to consider during its deliberations, and whether the remarks, in fact, influenced the verdict. *Id.* at 437, 466 P.2d at 391 (citations and internal quotation marks omitted).

¶23 Here, the prosecutor made several references to the fact that the argument that Defendant did not know about the gun was improper because there were no facts in the record to support it. The defense was attempting to convince the jury that inferences drawn from the evidence suggested that Defendant did not know the gun was in the trunk. For example, why would Defendant, a convicted felon, consent to a search of the trunk if he knew a gun was inside?

¶24 Even though the State mischaracterized the defense argument, we cannot conclude that the remarks deprived Defendant of a fair trial and were "so objectionable as to cause a

reversal of the case." *Id.* (citation and internal quotation marks omitted); *accord State v. Tucker*, 215 Ariz. 298, 319, ¶¶ 88-89, 160 P.3d 177, 198 (2007) (citations omitted) (reversal required only if improper comments are unduly prejudicial and likely affected verdicts). The jury was instructed at the outset of the trial and in the final instructions that closing remarks were not evidence, and only offered to help the jury understand the evidence. *See State v. Newell*, 212 Ariz. 389, 403, ¶¶ 68-69, 132 P.3d 833, 847 (2006) (citation omitted) (jury instructions may cure admission of improper statements). Despite the arguments of counsel, the jury had to determine the facts of the case, and there is no indication that the State's isolated comments resulted in the verdicts. *See Tucker*, 215 Ariz. at 319-20, ¶ 89, 160 P.3d at 198-99 (citation omitted) (convictions sustained based on curative jury instructions and substantial evidence in support of verdicts). Consequently, we find no reversible error.

¶25 Having addressed Defendant's arguments, we have also considered the opening brief and searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. The record, as presented, reveals that all of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was represented by counsel at

all stages of the proceedings and the sentences imposed were within the statutory limits.

¶26 After this decision has been filed, counsel's obligation to represent Defendant in this appeal has ended. Counsel need do no more than inform Defendant of the status of the appeal and Defendant's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984). Defendant can, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

CONCLUSION

¶27 Accordingly, we affirm Defendant's convictions and sentences.

/s/
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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
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ANN A. SCOTT TIMMER, Judge

/s/
_____
ANDREW W. GOULD, Judge