DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 08-0261
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
VICTOR CONRAD ALTAMIRANO, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-103129-001 DT

The Honorable Steven K. Holding, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Law Office of Nicole Farnum — Tempe
By Nicole T. Farnum
Attorneys for Appellant

Victor Conrad Altamirano — Buckeye
Appellant

S W A N N, Judge

¶1 Victor Conrad Altamirano ("Defendant") appeals from the superior court's judgment of guilt and imposition of sentence for two counts of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs, violations of A.R.S. § 28-1383 and class four felonies.

¶2 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defendant's appellate counsel has advised us that she has searched the record on appeal and finds no arguable question of law to raise on appeal. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). At Defendant's request, however, counsel has identified issues for review. In our view, the eight points articulated by counsel raise five issues: (1) the right to counsel; (2) the right to self-representation; (3) the right to due process; (4) the right to a speedy trial; and (5) the court's failure to allow Defendant to plead guilty but insane. Defendant has filed a supplemental brief *in propria persona* in which he provides argument on those issues.

¶3 Our independent review of the record reveals no fundamental error, and we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶4 On April 4, 2007, a grand jury indicted Defendant on two counts of aggravated driving or physical control while under the influence of intoxicating liquor or drugs, violations of A.R.S. § 28-1383 (Supp. 2008).[2] On April 13, 2007, Defendant was arraigned and entered a plea of not guilty. In accordance with Ariz. R. Crim. P. 8.2(a)(1), September 10, 2007 was designated the last day for trial.

¶5 On May 10, 2007, the Public Defender's Office, which had been appointed to represent Defendant, moved to withdraw from the representation because of a conflict of interest with a current client. That motion was granted and the Office of Public Defense Services was appointed to represent Defendant. But at Defendant's initial pretrial conference on May 31, 2007, no attorney appeared on Defendant's behalf. Defendant moved for dismissal based on the fact that he did not have legal representation. The court denied Defendant's motion and ordered that the Public Defender's Office verify its withdrawal and that the Office of Public Defense Services assign new counsel.

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[1] "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against [Defendant]." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997) (citation omitted).

[2] We cite the most current version of the statute because no revisions material to our decision have been made since the relevant period.

¶6 On June 11, 2007, the court on its own motion called the case for a hearing. Nobody had contacted the State regarding Defendant's case and the commissioner presiding over the case told Defendant, who was present at the hearing, that he had contacted the office of the Legal Advocate and the office of Defense Indigent Services but those offices seemed unaware of Defendant's existence. Defendant again moved for dismissal based on the fact that he did not have legal representation, and that motion was denied.[3] The commissioner stated on the record that his staff would contact the heads of all indigent defense services, and the prosecutor stated that his supervisor could also make calls. By July 23, 2007, Defendant was represented by counsel.

¶7 Defense counsel, waiving Defendant's presence, appeared before the court on July 27, 2007, the time set for a trial management conference. Counsel's motion for a continuance was granted and time was excluded from July 27, 2007 through September 27, 2007. The new last day for trial was October 22, 2007.

¶8 On August 10, 2007, a hearing was held at which Defendant moved to represent himself. Defendant's motion was

[3] Defendant also moved for dismissal of another case on speedy trial grounds, and that motion was also denied.

denied and defense counsel was affirmed as the attorney of record.

¶9 In early October 2007, defense counsel filed a written motion to continue trial and waive time, on the ground that counsel's schedule was conflicted by the case transfer system. In the motion, counsel noted that Defendant was "not happy" about the motion and did not agree to waive time to allow the court to grant the motion. After holding a hearing on October 5, 2007, the court granted counsel's motion to continue and excluded time from October 9, 2007 through November 2, 2007.[4] The new last day for trial was November 15, 2007.

¶10 Trial was scheduled to begin on November 7, 2007. On that date, before jury selection commenced, defense counsel presented argument on Defendant's motions to dismiss on ineffective assistance of counsel and speedy trial grounds. Both motions were denied. Defense counsel then informed the court that Defendant had told counsel that he wanted to plead guilty except insane. That request prompted defense counsel to move for a redetermination of Defendant's competency pursuant to

[4] Although the court's minute entry for the October 5, 2007 hearing indicates that defense counsel was "Not Present," the minute entry also indicates that on that date, a continuance was granted on defense counsel's oral motion. No transcript of the hearing is included in the record on appeal. Based on the content of the minute entry, we infer that defense counsel was present at the proceeding.

Ariz. R. Crim. P. 11.[5] The court did not immediately rule on the motion, but instead vacated the trial and reset it to the next day, November 8, 2007.

¶11 On November 8, 2007, the court granted defense counsel's motion for a determination of competency. In addition, the court denied Defendant's written motions to waive his right to counsel and to change counsel to himself. Trial was vacated and time was excluded until Defendant's competency was determined. On January 8, 2008, the court accepted the parties' written stipulation of Defendant's competency based on the reports of the two doctors appointed to evaluate Defendant, and, accordingly, found Defendant competent. With the exclusion of time, the new last day for trial was January 15, 2008.

¶12 On January 15, 2008, a trial management conference was held. The court excluded additional time in the interest of justice, and the new last day for trial was February 4, 2008. Defendant again moved to represent himself, and his motion was again denied.

¶13 Trial commenced on February 4, 2008. Before voir dire began, an impromptu settlement conference was held at Defendant's request. The court explained the charges and possible sentences, and the terms of the State's plea offer.

[5] Defendant's competency had earlier been determined through Ariz. R. Crim. P. 11 proceedings.

Asserting that his constitutional rights, especially his right to a speedy trial, had been violated, Defendant rejected the State's plea offer. The court then held an Ariz. R. Evid. 609 hearing on Defendant's four prior felony convictions, which the State had earlier alleged. The court ordered that the prior convictions could be introduced but the State was required to sanitize them.

¶14 Voir dire and trial commenced. At trial, the State presented evidence that on the morning of October 3, 2006, Officer Lillian Molina of the Phoenix Police Department conducted a traffic stop of a vehicle being driven by Defendant because the vehicle had invalid plates. Officer Molina activated the lights on her marked patrol vehicle but although Defendant appeared to see the patrol vehicle, he did not immediately stop his vehicle. Instead, he continued driving for approximately two blocks before stopping his vehicle at his mother's residence.

¶15 When Officer Molina approached Defendant's vehicle, she noticed an odor of alcohol emanating from Defendant's person, as well as an open container of an intoxicating beverage in the middle console. Other unopened containers were on the floorboard of the passenger side. Defendant gave Officer Molina an "old-style" driver's license and told her that his license was revoked. Officer Molina directed Defendant to exit the

vehicle. She observed that he was experiencing problems with his balance and had bloodshot and watery eyes. Defendant told Officer Molina that he had consumed about ten beers.

¶16 Officer Carlos Rodriguez of the Phoenix Police Department responded to the scene. Like Officer Molina, he noticed that Defendant emanated a strong odor of alcohol, had bloodshot and watery eyes, and was experiencing problems with his balance. Officer Rodriguez also noticed that Defendant was sweating profusely. When questioned by Officer Rodriguez, Defendant stated that he had consumed two beers.

¶17 Defendant refused to submit to field sobriety tests and was taken to a Department of Public Safety station where, after being advised of the consequences of refusal, he agreed to complete a breath test using an Intoxilyzer 8000. Officer Rodriguez, a certified operator of the Intoxilyzer 8000, followed all required procedures in administering the test and collected two breath samples, about seven minutes apart. The test result for Defendant's first breath sample indicated that he had an alcohol concentration of 0.154, and the result for his second breath sample indicated that he had an alcohol concentration of 0.166. A Department of Public Safety Intoxilyzer 8000 quality assurance specialist testified that based on calibration checks, the machine used to test Defendant was working properly at the relevant time. Another Department

of Public Safety quality assurance specialist and forensic alcohol criminalist similarly testified that the machine used to test Defendant was working properly at the relevant time, and also testified that Intoxilyzer 8000 machines contain safeguards that prevent inaccurate results.

¶18 The State finally presented evidence that Defendant's driver's license was suspended and revoked at the time he was stopped. An Arizona Motor Vehicle Division Deputy Custodian of Records testified that based on Defendant's Motor Vehicle Division Records, which were admitted into evidence, Defendant's license had been suspended and revoked since 1989. Fifty-five notices of the suspension and revocation had been mailed to the address that Defendant had identified to Officer Molina as his mother's residence.

¶19 At the close of the State's case in chief, Defendant moved for a judgment of acquittal pursuant to Ariz. R. Crim. P. 20. That motion was denied, and Defendant took the stand over his counsel's advice. After Defendant refused to answer questions on direct examination regarding his prior convictions, citing the Fifth Amendment, the court recessed until the next day. Before Defendant resumed testifying the next morning, the court, outside the presence of the jury, ordered him to not invoke his Fifth Amendment right and warned him that if he did refuse to answer a question, he would be held in contempt of

court. Defendant indicated that he understood, and resumed testifying. Defendant testified that on the morning of October 3, 2006, he drank two twenty-four ounce cans of beer, the second of which he "downed" or "guzzled" immediately before driving. He testified that he was stopped soon after he began driving and at that point his alcohol concentration would have been below 0.05. Defendant also testified that although he did not have a driver's license, he was eligible to obtain a license but had not paid the required fines or fees.

¶20 After hearing closing arguments and considering the evidence, the jury found Defendant guilty of two counts of aggravated driving or physical control while under the influence of intoxicating liquor or drugs and guilty of the lesser-included offenses of driving under the influence of intoxicating liquor or drugs. The court entered a judgment notwithstanding the verdict and dismissed the verdicts on the lesser-included offenses on double jeopardy grounds.

¶21 After a trial on Defendant's prior felony convictions, the court found that Defendant had four prior felony convictions and was on release from prison on community supervision when he committed the current offenses. The court entered judgment on the jury's verdicts and sentenced Defendant to concurrent terms of twelve years of imprisonment for each offense, with credit for 397 days of presentence incarceration.

¶22 Defendant timely appeals. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (Supp. 2008).

DISCUSSION

I. Right to Counsel

¶23 Both the federal and state constitutions guarantee criminal defendants the right to counsel. U.S. Const. amend. VI, XIV; Ariz. const. art. II, § 24; *see also* Ariz. R. Crim. P. 6.1. The right extends to all "critical stages" of the criminal proceeding. *State v. Conner*, 163 Ariz. 97, 104, 786 P.2d 948, 955 (1990). "A critical stage is one where substantial rights of the [defendant] may be affected." *Id.* (citations omitted). Here, Defendant was not represented by counsel at his initial pretrial conference on May 31, 2007. The lack of representation at this stage did not violate Defendant's right to counsel. *See State v. Anderson,* 197 Ariz. 314, 326, ¶ 34, 4 P.3d 369, 381 (2000) ("The purpose of the initial appearance is to advise the defendant of the charges against him and to *inform* him of his right to counsel and to remain silent." (Emphasis added.)). He still did not have counsel by June 11, 2007, when the court *sua sponte* held a hearing to address the issue. By July 23, 2007, however, he was represented by counsel, and thereafter counsel appeared on his behalf at every stage of the

proceedings. At all "critical stages" of the proceedings, Defendant was represented by counsel. We therefore find no error, much less fundamental error, in the trial court's denial of Defendant's motions for dismissal based on the absence of legal representation.

II. Right to Self-Representation

¶24 "The right to counsel under both the federal and state constitutions includes a defendant's right to proceed without counsel" if he so chooses. *State v. Lamar*, 205 Ariz. 431, 435, ¶ 22, 72 P.3d 831, 835 (2003) (citations omitted). To exercise that right, the defendant must timely request to waive his right to counsel. *Id.* at 436, ¶ 22, 72 P.3d at 836. The request is timely if it is made before the jury is empaneled. *Id.* The defendant's waiver must be knowing, voluntary, and intelligent. *State v. Cornell*, 179 Ariz. 314, 322, 878 P.2d 1352, 1360 (1994). Whether a waiver is knowing, voluntary, and intelligent is a question of fact, to be decided "based substantially on the trial judge's observation of the defendant's appearance and actions." *State v. Dann*, 220 Ariz. 351, 358, ¶ 10, 207 P.3d 604, 511 (2009) (citation omitted). Traditionally, "courts indulge every reasonable presumption against the waiver of fundamental constitutional rights." *State v. Doss*, 116 Ariz. 156, 160, 568 P.2d 1054, 1058 (1977).

¶25 Here, Defendant requested to waive his right to counsel on three separate occasions, and on each occasion his request was denied. We conclude that the trial court did not abuse its discretion in denying Defendant's requests.

¶26 On the first occasion, the August 10, 2007 hearing, the court asked Defendant a series of questions: whether he had any legal training, whether he had any knowledge of the equipment used to measure alcohol concentration in blood or breath, whether he knew how the State would prove prior felony convictions, whether he had any knowledge of fingerprint analysis, and whether he understood the possible sentences that he faced if convicted. Defendant answered the questions and also added that he wanted the court to appoint him a specialist to assist him in explaining his theory of the case at trial. At the conclusion of the colloquy, the court denied Defendant's request to waive counsel, stating: "[Defendant], I appreciate your willingness to represent yourself, however, due to the gravity of these cases I do not believe you are qualified to do so, and then by allowing you to do so I would actually be abusing my discretion."

¶27 The court's colloquy was not ideal. The validity of a waiver of the right to counsel is based on whether the defendant has knowingly, voluntarily, and intelligently relinquished a constitutional right – not on whether the defendant has skill

and experience. *Doss*, 116 Ariz. at 160, 568 P.2d at 1058; *State v. Fayle*, 134 Ariz. 565, 573, 658 P.2d 218, 226 (App. 1982). "[W]hile the trial court may consider a defendant's background, experience, and his understanding of his rights and the role of counsel, a defendant's technical legal knowledge is irrelevant to an assessment of whether there is an intelligent and knowing waiver of counsel." *State v. Binder*, 170 Ariz. 519, 520, 826 P.2d 816, 817 (App. 1992). Here, the court's questions emphasized the issues of Defendant's skill, experience, and technical legal knowledge, and explained that it was denying Defendant's request based on Defendant's qualifications and the gravity of his cases. But although the tenor of the court's colloquy and its explanation of its rulings were imperfect, we cannot conclude that the court abused its discretion in concluding from the totality of the circumstances that Defendant's waiver was not valid.

¶28 Defendant's second request to waive his right to counsel was considered at the November 8, 2007 hearing at which the court granted defense counsel's motion for a determination of competency. In denying Defendant's written motions to waive his right to counsel and change counsel to himself, the court noted: "1) They are not timely therefore it's denied on that ground. And, 2) [t]hey are without merit. This Court believes it is not in [Defendant's] best interest nor is he capable of

protecting his own rights by representing himself therefore, denied on both grounds." Because the jury had not yet been empaneled, we interpret the trial court's characterization of Defendant's request as "not timely" as referring to the fact that it would be inappropriate to grant a defendant's motion to waive the right to counsel when that defendant's very legal competency is currently being evaluated. A defendant who is mentally incompetent cannot validly waive his constitutional rights. *Doss*, 116 Ariz. at 160, 568 P.2d at 1058. On this ground alone, the court did not abuse its discretion in denying Defendant's request.

¶29 The last time Defendant requested to waive his right to counsel was at the January 15, 2008 trial management conference. On that occasion, Defendant argued that because he had been found competent, he should automatically be qualified to waive his right to counsel. In denying Defendant's request, the court noted that due to the gravity of the case and Defendant's own actions, the court did not believe that Defendant could make a knowing and intelligent decision. That determination was well within the trial court's discretion, and on this record we find no abuse of discretion.

III. Right to Due Process

¶30 Defendant argues that his constitutional right to due process was violated because he was not present at all hearings.

Based on the Sixth Amendment, a criminal defendant has a right to be present at every stage of his trial. *State v. Dann*, 205 Ariz. 557, 571, ¶ 53, 74 P.3d 231, 245 (2003); Ariz. R. Crim. P. 19.2. That right, however, applies only to proceedings in open court where the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.* (citation omitted). "When reviewing a defendant's absence from preliminary hearings, the court should examine the record as a whole and determine 'whether [the] accused suffered any damage by reason of his absence.'" *Id.* at 245-46, ¶ 53, 74 P.3d at 571-72 (quoting 23A C.J.S. *Criminal Law* § 1162(b) (1989)).

¶31 The record reveals that Defendant was present at all stages of the proceedings, with the exception of two pretrial hearings and one discussion at trial held outside of the jury's presence. At both of the pretrial hearings, Defendant's presence was waived by counsel: on April 4, 2007, defense counsel waived Defendant's presence at a hearing on the State's motion to vacate the preliminary hearing, and on July 27, 2007, counsel waived Defendant's presence at a hearing at which counsel's first motion for a continuance was granted. Defendant suffered no damage by reason of his absence from those hearings.

¶32 At trial, Defendant was not present when the court and counsel for both parties discussed the legal issues implicated

by Defendant's refusal to answer questions on direct examination. That discussion about legal issues, however, did not require Defendant's presence and his absence did not diminish his opportunity to defend himself.

¶33 We therefore conclude that Defendant's right to be personally present was not violated.

IV. Right to Speedy Trial

¶34 Defendant argues that he was denied his constitutional right to a speedy trial. We find no violations of that right. Defendant first argues that on July 27, 2007, the trial court abused its discretion in granting his counsel's motion to continue and excluding time after a hearing at which Defendant was not present. But as we have already noted above, Defendant's presence at that hearing was waived by his counsel and Defendant did not suffer prejudice by reason of his absence. Defendant next argues that on October 5, 2007, the trial court abused its discretion in granting his counsel's motion to continue and excluding time when Defendant had objected to the motion. But "[w]e have held that delays agreed to by defense counsel are binding on a defendant, even if made without the defendant's consent." *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997) (citations omitted).

¶35 On the record before us, we find no violations of Defendant's right to a speedy trial.

V. Guilty Except Insane Plea

¶36 Defendant argues that the court erred in not allowing him to plead guilty except insane. Defense counsel first alerted the court that Defendant wanted to plead guilty except insane on November 7, 2007. But no motion to allow Defendant to plead guilty except insane was ever made by counsel, and the court never ruled on the issue. Regardless, a claim of guilty except insane is an affirmative defense, A.R.S. § 13-502(A) (Supp. 2008), and Defendant did not comply with the requirements of Ariz. R. Crim. P. 15.2(b) and (d)(1) to timely provide the State written notice of his intent to introduce the defense at trial.

VI. Remaining Issues

¶37 The record reflects that Defendant received a fair trial. The record of voir dire does not demonstrate the empanelment of any biased jurors, and the jury was properly comprised of eight jurors and one alternate. *See* A.R.S. § 21-102(B) (2002). At trial, the State presented properly admissible evidence sufficient to support the jury's findings of guilt. And although no hearing was held to determine whether Defendant's admissions to Officer Molina and Officer Rodriguez regarding his consumption of alcohol and lack of a driver's license were voluntary, Defendant did not request such a hearing and neither the prosecutor nor the court had any obligation to

raise the issue. *State v. Alvarado*, 121 Ariz. 485, 487, 591 P.2d 973, 975 (1979). The prosecutor's closing and rebuttal arguments did not contain reversible error, the jury was properly instructed, and there was no evidence of any jury misconduct.

¶38 After the jury returned its guilty verdicts on the charged offenses, the court properly dismissed the guilty verdicts on the lesser-included offenses. The trial on Defendant's prior felony convictions comported with all applicable rules. Before sentencing, the court ordered and considered a presentence report. At sentencing, Defendant was given the opportunity to speak and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. The sentence imposed was within the permissible range for the offenses. Although it appears from the materials we have been provided that Defendant was incarcerated for 390 days before sentence was imposed, the court credited Defendant with 397 days of presentence incarceration credit. But any illegal sentence that favors a defendant cannot be corrected unless the State has filed a timely cross-appeal, *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990), and the State did not do so here.

CONCLUSION

¶39 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant has thirty days from the date of this decision to file a petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has thirty days from the date of this decision in which to file a motion for reconsideration.

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PETER B. SWANN, Presiding Judge

CONCURRING:

/S/

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LAWRENCE F. WINTHROP, Judge

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MICHAEL J.BROWN, Judge