

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



DIVISION ONE  
FILED: 03/06/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 10-0996  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication - Rule  
ANGEL VALLEJOS, ) 111, Rules of the Arizona  
) Supreme Court)  
Appellant. )  
)

Appeal from the Superior Court in Navajo County

Cause No. CR 2008-0875

The Honorable Thomas L. Wing, Judge

**AFFIRMED**

Thomas C. Horne, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
and Katia Méhu, Assistant Attorney General  
Attorneys for Appellee

Emery K. La Barge Snowflake  
Attorney for Appellant

**N O R R I S**, Judge

¶1 Angel Vallejos timely appeals his convictions and sentences on three counts of aggravated assault. Vallejos first asserts the superior court committed reversible error by not

making any findings regarding his competency to stand trial and ensuring the recordation of a hearing addressing the same issue. As to both issues Vallejos has misconstrued the record as supplemented with an August 3, 2010 transcript.

¶12 At the beginning of the August 3 hearing, the superior court advised the parties it had read the report prepared by Christopher Linskey, M.D., the psychiatrist Vallejos had nominated to evaluate his competency. Because Dr. Linskey had concluded Vallejos was competent to stand trial, the State asked the court to make that finding. In response to the State's request the court find Vallejos competent to stand trial based on Dr. Linskey's report, Vallejos's counsel stated, "I have no problem with that, and I don't believe my client has any problem with that." Vallejos's counsel additionally noted that, based on Dr. Linskey's suggestion Vallejos might have been unable to tell right from wrong at the time of the offenses, he had noticed an insanity defense, "because I believe that we're going to need a trial in this case now that he's competent."

¶13 Because the parties had raised no objection to or disagreement with Dr. Linskey's report and conclusions regarding Vallejos's competency to stand trial, the court and counsel for the parties proceeded to discuss Vallejos's anticipated insanity defense, and whether Dr. Linskey could testify "to the defendant's state [of mind] at the time [of the offenses] or

whether he [would need] to do further examination" before rendering such an opinion. At the conclusion of the hearing and at Vallejos's counsel's request, the court set the case for trial. Although the superior court did not make a specific finding during the August 3 hearing that Vallejos was competent to stand trial and should have done so,<sup>1</sup> the transcript of that hearing clearly reflects the parties and the court all agreed Vallejos was competent to stand trial. Under these circumstances and because Vallejos did not object to the court's failure to make an express finding on competency, we see no reversible error.<sup>2</sup>

¶4 The record as supplemented also fails to demonstrate the hearing on September 28, 2010, which was not recorded, concerned Vallejos's competency to stand trial. As discussed, the court had resolved that issue at the August 3 hearing. Consistent with the discussion between the court and counsel at the August 3 hearing regarding further evaluation by

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<sup>1</sup>See *State v. Rose*, 24 Ariz. App. 25, 28, 535 P.2d 617, 620 (1975) (remanding when court "failed after the second set of medical reports were filed to determine, on the record, whether defendant was competent to stand trial" and there was "no indication from the minute entry . . . that the judge ever reached that issue"); see generally *State v. Evans*, 125 Ariz. 401, 403, 610 P.2d 35, 37 (1980) ("[T]he better practice would be for the trial judge to make specific findings.").

<sup>2</sup>Because Vallejos failed to object to the absence of an express competency finding, on appeal he bears the burden of demonstrating fundamental, prejudicial error. See *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005).

Dr. Linskey, Vallejos moved for a Rule 11.2 examination by Dr. Linskey to "determine whether or not the defendant was legally insane at the time of the commission of the alleged crime." According to the minute entry for the September 28 hearing, neither the parties nor the court had yet received what was described as a "mental health evaluation," and Vallejos's counsel did "not know the outcome of the evaluation or whether the doctor [would] be available to testify if this matter [went] to trial." The missing "mental health evaluation" was, thus, a reference to Dr. Linskey's evaluation of Vallejos's mental state at the time of the alleged offenses, which was not filed with the court until September 29, 2010.

¶15 Finally, Vallejos argues the superior court committed fundamental, reversible error in violation of his Sixth Amendment rights by proceeding in his absence at a pretrial hearing on October 6, 2010. Applying fundamental error review because Vallejos raised no objection, *see supra* note 2, we disagree.

¶16 On the first day of trial, before voir dire, the superior court noted Vallejos's absence, advised counsel "we've called for the defendant," and stated that when Vallejos arrived, it wanted to discuss the following issue:

First of all, . . . two indictments . . . were consolidated in the case that I have called . . . , the first two counts of which

in each indictment as I compared them are exactly the same. If that's the case, then really we can't read to the jury two counts twice as charges pending against the defendant. But that's the current status. There are two indictments; Counts 1 and 2 in each indictment, as I read them, are exactly the same wording.

Vallejos's counsel immediately responded: "Judge, now that I know what the subject matter of this conference is, I'll waive my client's appearance for this proceeding. He wouldn't understand what was going on anyway." After the court and counsel resolved that issue and discussed the number of jurors needed to try the case, the court advised Vallejos's counsel "any time you want your client present, interrupt and tell me that." The court and counsel then addressed the form of verdicts with respect to dangerousness allegations and other procedural issues relating to allegations of aggravating circumstances, which included prior convictions. At no time during this discussion did Vallejos's counsel inform the court he wanted his client present. Vallejos appeared and was present before voir dire began.

¶7 Defendants have a Sixth Amendment right "to be present at every stage of the trial." *State v. Dann*, 205 Ariz. 557, 571, ¶ 53, 74 P.3d 231, 245 (2003) (citations omitted). This right is limited, however, "to those proceedings . . . [in which a defendant's] presence has a relation, reasonably

substantial, to the fullness of his opportunity to defend against the charge." *Id.* (quotations and citations omitted). A defendant's right to be present does not extend to "conferences characterized as relating only to the resolution of questions of law." *Id.* (quotation 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 571-72, ¶ 53, 74 P.3d at 245-46 (quotations and citations omitted).

¶8 Moreover, a defendant may waive his right to be present. Ariz. R. Crim. P. 9.1. A defendant's personal waiver is required for relatively few constitutional rights, such as the right to counsel, the right to jury trial, and the right to a twelve-person jury. See *State v. Swoopes*, 216 Ariz. 390, 399, ¶ 28, 402, ¶ 39, 166 P.3d 945, 954, 957 (App. 2007). For other rights, however, "a trial court may rely on counsel's waiver of a defendant's right to be present . . . [and] personal waiver by the defendant is not required." *State v. Canion*, 199 Ariz. 227, 234, ¶ 26, 16 P.3d 788, 795 (App. 2000) (citation omitted). In these types of proceedings, "[u]nless the circumstances are exceptional, a defendant is bound by his counsel's waiver of his constitutional rights, even without a showing that the attorney consulted with the defendant." *Id.* (quotation and citations omitted).

¶9 Here, even if we assume Vallejos's counsel was not authorized to waive his presence for this hearing, the superior court did not violate Vallejos's Sixth Amendment rights. During the hearing, counsel and the court discussed purely legal issues. Further, Vallejos has failed to show how his presence at the hearing "would have affected his ability to defend against the charges or how he was prejudiced" by his absence. See *Dann*, 205 Ariz. at 575, ¶ 73, 74 P.3d at 249.

¶10 For the foregoing reasons, we affirm Vallejos's convictions and sentences.

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
MARGARET H. DOWNIE, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
ANN A. SCOTT TIMMER, Judge